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The Mi'kmaq and Criminal Justice in Nova Scotia
A Research Study 1989

The Mi'kmaq and Criminal Justice in Nova Scotia

Research Study

Prepared for
The Royal Commission on the Donald Marshall, Jr., Prosecution

by
Scott Clark, Ph.D.
G. S. Clark and Associates Ltd.
Ottawa, Ontario
Canada

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This research represents the views of the researcher and not necessarily those of the Commissioners.

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Executive Summary

Part 1 of the report deals with the organization of the study. The approach involved focussing on three reserves (Eskasoni, Membertou and Shubenacadie) as rural, urban and semi-urban communities, respectively. Halifax was included as one of the communities for study because of the increasing number of young Native people moving between the city and their reserves. The study concerned aboriginal people living both on and off reserves as "status" and "non-status" Indians. The study was limited, however, in its work with off-reserve individuals.

Four types of information collection were used in the study: interviews, document review, statistical review, and literature review. Interviews were held with Native people and justice system personnel throughout the province, with a particular focus in the three selected reserve communities and Halifax. The interviews provided the most useful evidence, while the statistical review yielded very little useful information due largely to the fact that most provincial government data do not specify whether the individual involved in the justice system is Native or non-Native.

The study employs the concept of *adverse effect* in recognition of the facts (a) that the intent to discriminate is very difficult to prove, and (b) that discrimination may be only one of several causes that result in adverse effects for Natives involved in the criminal justice system. The focus is on systemic or structural problems.

Part 2 briefly examines the aboriginal context in Canada. Canada's aboriginal population of approximately 1,390,000 (in Nova Scotia approximately 11,000) is highly over-represented in federal prisons on a national basis. Similarly, aboriginal people, particularly in their reserve communities, endure socio-economic conditions unthinkable in the rest of Canadian society. These conditions result in much higher suicide rates, alcoholism and family breakdown rates than for Canada as a whole. Ultimately, these conditions bear on the relationship between Native communities and crime.

Section 91(24) of the *Constitution Act, 1867* confers exclusive legislative jurisdiction on the federal government with respect to Indians (i.e., status Indians living on-reserve and off-reserve) and lands reserved for Indians. However, currently provincial governments take primary responsibility for the provision of services to status Indians living off-reserve. Aside from some specific on-reserve services provided by the provinces, the federal government through the Department of Indian Affairs and Northern Development takes primary responsibility. Federal policy is implemented through the *Indian Act* which enables Band governments to manage most programs on-reserve.

A number of items of unfinished business remain between aboriginal groups and the federal government. Priority concerns are

constitutional issues, particularly as they relate to aboriginal and treaty rights and claimed rights to self-government; land claims; Indian self-government arrangements; and socio-economic conditions in Indian communities. However, progress has been very slow on these issues because, in large part, of both federal and provincial inabilities to agree on jurisdiction and the authority that should be accorded Indian community governments.

In terms of justice issues, it would appear that federal law will remain supreme on lands reserved for Indians to the extent that Parliament so legislates by virtue of its Section 91(24) authority. As a result, it is arguable, for example, that no provincial law may directly or indirectly interfere with a duly enacted "federal" self-government regime on "lands reserved for Indians", including provisions relating to the administration of justice.

In reality, practical considerations will temper these absolute legal concepts, especially in areas relating to the administration of justice. In particular, because of current shared funding arrangements and current shared jurisdictions, the active cooperation of provincial authorities will be essential to the effective exercise of future aboriginal legislative authorities relating to justice matters.

Part 3 of the report introduces the Mi'kmaq context, including the historical relationship between the Mi'kmaq and White society and government, and the current situation facing the Mi'kmaq people. Historically, there has been a process of economic underdevelopment in Mi'kmaq communities. This process has inevitably led to dismaying standards of living characterized, for example, by an unemployment rate in reserve communities of well over 50 percent. When also faced with severe restrictions on their abilities to hunt and fish due to provincial legislation and non-recognition of treaty rights, the unemployment figures become even more significant.

The 13 Bands in Nova Scotia are represented by two umbrella political organizations: the Union of Nova Scotia Indians and the Confederacy of Mainland Micmacs. Aboriginal people living off-reserve are represented by the Native Council of Nova Scotia. The Grand Council of the Mikmaw Nation is a long-standing advocacy organization representing all Micmacs.

The three focus reserve communities are examined and are seen to have a number of under-resourced social service programs. Each is represented by a different type of police force: Membertou is policed by the Sydney City Police; Eskasoni by its own Band Police; and Shubenacadie by the RCMP through its Special Constable (i.e., Native) program. Crime rates are significant given the populations but tend to be primarily property offences, followed by assaults.

Part 4 examines the adverse effects for Natives of being involved in the criminal justice system in Nova Scotia. It is stressed at the

outset that problems, needs and solutions must be viewed in a community-specific way due to the variation among Native communities on each of these factors. Second, it is noted that in Nova Scotia, as in other parts of the country, a high proportion of Native offences are alcohol related. This might not only reflect the living conditions faced by Native people, it may also result in differential processing by the police, the courts and social services, as has been suggested by other studies in Canada.

Each type of policing represented in the three focus communities and in Halifax appears to have its own deficiencies. The initial question for people living in the communities is: are police supposed to enforce the law, or are they supposed to act first as mediators? This dilemma can result in poor police-community relations, especially in cases where the police constable is from the community he/she is policing.

There are also problems arising from inadequate training, particularly in the areas of interpersonal relations and group dynamics - skills which could contribute successfully to conflict resolution in reserve communities.

Response time to calls from reserves tends to be slow, except in Eskasoni which has a resident police force. The problem may be connected to a certain degree of stereotyping by police that the problems on-reserve are relatively insignificant and will usually have "blown over" by the time the police arrive. This is particularly important when it is realized that no crisis facilities such as womens' shelters exist on the reserves. The police, therefore, are the only institutional avenue available to people in immediate danger.

With regard to sentencing, the study was not able to reach conclusions about whether or not there exists sentencing disparity (Native/non-Native) in Nova Scotia. Interviews with Crown prosecutors and defence counsel did, however, suggest that judges apply different criteria for Natives and non-Natives in their sentencing. In the case of some judges, this favoured Native people; in others it did not. In this connection the imposition of fines is particularly problematic for Native people given their significantly lower income levels compared to non-Natives.

With respect to probation, a disparity was seen in the preparation of pre-disposition reports and pre-sentence reports in that fewer relevant informants were contacted in Native communities than in non-Native cases. As well, options to incarceration are essentially non-existent in Native communities which do not enjoy the same level of fine option and Alternative Measures programs as are available in non-Native communities.

Similarly, there are few institutional supports for offenders returning to their reserves, a fact that tends to be noted by parole

officers in the preparation of their assessments. Further, parole officers are obliged to account for prospects for employment in their assessments, a factor which is essentially not applicable to reserve communities. These questions are therefore automatically loaded against Micmac interests in their applications for parole.

Aftercare programs designed to meet the needs of Micmac individuals and communities are non-existent except for the overburdened and underfunded Micmac Friendship Centre in Halifax. This is a real concern in light of the increasing numbers of young Micmacs entering the correctional system.

Access to legal counsel is not a major problem in Nova Scotia except to the extent that legal aid lawyers are generally overburdened with cases and often unable to spend the required time with clients (Native or non-Native). Problems of communication do occur, however, based on a lack of understanding by counsel of the context in which Native people live, and by the client of the role of counsel. Again, this is a reflection of inadequate time available to legal counsel to spend with individual clients. It also suggests the need for public legal education directed at Native people, particularly the young.

Conceptualization of the judicial process and language are common barriers in the courtroom, as well. This is true to the extent that due process can be called into question in some cases. The fact that a Native person has never been called to serve on a jury in Nova Scotia also raises serious questions about the judicial process.

The relevance of the judicial process is a general issue raised frequently by Micmac leaders and others. Because the courts are often some distance from reserves (e.g., Eskasoni), it is often difficult for people to attend court as accused, witnesses or observers. The court, which is already unfamiliar and somewhat intimidating, is physically and conceptually removed from the indigenous processes of social control based on mediation and restitution. Community justice processes are ignored as non-Natives dispense their form of justice in Native communities. Restitution in the form of fines is made to the state, not to the offender's community or to the individual victim. In summary, Natives believe that they have no stake in the court process.

Indigenous processes of conflict resolution such as the extended family and mediation/reconciliation are seen to offer opportunities for the development of community-based justice processes. This is especially timely in view of the self-government development initiatives that are being taken in other parts of the country and that are currently being taken in unique ways in Micmac communities.

Part 5 examines responses to the problems. By way of preamble, the report notes that the challenge for Native groups, including the

Micmac, is to define "appropriate justice processes" to suit the needs of their communities. A further challenge exists for the same aboriginal groups and for the federal and provincial governments to reach agreement on new structural relations that will enable changes to be made and to continue working. This will necessarily involve more than the simple "indigenization" of the existing system (i.e., replacing non-Native personnel with Native personnel who would perform the same functions). Finally, it must be recognized that the primary causes underlying problems for Natives in the justice system are related to social and economic conditions, not to the justice system *per se*. It is there that we must focus much of our attention.

In addition to that major area of concern, there are certain outstanding issues that must be resolved:

(1) The implementation of an effective constitutional process enabling self-government for aboriginal nations - in order that community governments can plan, coordinate and control policies and programs for their people;

(2) The recognition of other aboriginal rights referred to in the Canadian Charter of Rights and Freedoms - *in order that aboriginal people can again derive economic and cultural strength from their land and resources;*

(3) The recognition by the Province of Nova Scotia of Micmac treaty rights - in order that the Micmac can exercise their territorial rights to their land base. The current impasse in this area is exemplified in the Simon *case.*

The development of community-based justice systems covers a wide range of possibilities from the implementation of new programs such as Alternative Measures for young offenders to the application of Micmac customary law through tribal courts. The rate of development leading to a Micmac justice system would be determined by a number of factors:

(1) The will and abilities of Micmac people and their leaders to move in this direction;

(2) The political will of the federal and provincial governments to resolve outstanding issues and to support the development of an aboriginal justice system;

(3) The will of the people of Nova Scotia to support such a development;

(4) The identification (and, if necessary, the institution) of a body to do the required development work;

(5) The establishment of a tripartite forum (Micmac/federal/provincial) for the discussion and negotiation of a Micmac justice system.

The report examines the range of possibilities for the development of community-based or tribal courts, community-based policing, a community-based Native Court Worker program, diversion, fine option and alternative measures programs, and Native Justices of the Peace. Prior and ongoing examples from other parts of the country are examined. More work is required before the applicability and the nature of such developments can be determined. The way to begin, however, is to start tackling some of the problems already defined by initiating pilot projects and closely evaluating the results.

Part 6 of the report presents findings and recommendations.

Preface

The Royal Commission on the Donald Marshall, Jr., Prosecution was established in response to a specific series of events that resulted in the wrongful conviction and imprisonment of an individual Micmac. The Commissioners recognized early in the inquiry process that the case of Donald Marshall, Jr., might not be unique. Questions about discriminatory treatment of Micmacs in the justice system raised the spectre of a widespread problem that, if real, represented a terrible contradiction to the principles of equality and fairness on which the Canadian justice system is based. The Commissioners therefore decided to have a study undertaken to determine if discrimination against Native people exists in the criminal justice system in Nova Scotia.

This study takes the approach that we must not only identify adverse effects for Natives involved in the system, but that we must explain the underlying causes of those problems. In order to accomplish this, it is necessary to look at history, social structure and economies as a way to explain contemporary conditions and behaviours. Only when we have an understanding of the basis of contemporary problems can we begin to talk about solutions.

The study has involved fieldwork in various Nova Scotia communities. Many people have been interviewed, including Micmacs living on and off their reserves and personnel working in the justice system. Statistical data sources, though limited, have been examined and literature has been reviewed. Conclusions were reached as a result of the research, and further analysis led to the formulation of recommendations. Yet the study is not exhaustive. More work is required to achieve complete coverage of Micmac communities with a view to identifying problems and possible solutions on a community-specific basis. Similarly, not enough time was spent learning about the needs of Micmacs living away from the reserve communities nor about problems in prison. A data base that would contribute to an understanding of ongoing conditions should be developed using provincial government and police information. These tasks, among others, will have to be completed as part of a new process of cooperation between Micmacs and the federal and provincial governments.

On the positive side, this study provides the first comprehensive indication of problems experienced by Natives in the criminal justice system in Nova Scotia. Further, it is based on enough information to be able to recommend certain immediate steps, and to demonstrate the need to begin working towards other longer-term goals.

In the end, however, the study will be of no value unless there exists the public will and the political will to accept that problems exist and to work towards finding solutions. This applies to Native people as much as to non-Native society, since understanding and

cooperation will be the most important ingredients in any future efforts.

The report is divided into six parts:

1. *Organization of the Study*
2. *The Aboriginal Context in Canada*
3. *The Mi'kmaq Context*
4. *Mi'kmaq and the Criminal Justice System*
5. *Responses to Problems*
6. *Findings and Recommendations.*

There are three appendices. Appendix 1 is a list of the participants who gave the researcher the benefit of their comments on the first draft of this research report, at a workshop held on June 16, 1988. Appendix 2 is a submission prepared for the Royal Commission by Dr. Marie Battiste on behalf of the Grand Council of the Mikmaw Nation. Appendix 3 is a response by Ms. Viola Robinson, President of the Native Council of Nova Scotia, to the first draft of the report. These two latter appendices provide valuable information.

Part 1
Organization of the Study

1.1
Introduction

The following assumptions about the research were set out at the beginning of the project:

(1) The research was to focus on adverse effects of discrimination as experienced by Native people in the Nova Scotia criminal justice system.

(2) The study was to address the criminal justice system from charging to court disposition through to post-sentencing treatment (prison, parole and aftercare). It was also to cover public legal education and to include adults and young offenders.

(3) The study was not to be restricted in terms of the time period being examined, although the focus was to be on the present.

(4) For purposes of the research, "Native" was to refer to "status" Indians, "non-status" Indians, Metis and Inuit. (The Nova Scotia Native population comprises almost exclusively "status" and "non-status" Indians.)

(5) The study was to refer primarily to accused and convicted persons, although the treatment of victims and witnesses in the system was not to be ignored.

The major research issues identified at the beginning of the project are outlined below:

1. Policing
   - arrest procedures
   - charging procedures
   - patrol of communities
   - community liaison
   - types of Native policing
2. Access to legal representation
3. Court processes
4. Court dispositions
5. Sentencing
6. Probation
7. Parole
8. Native awareness of law and the justice system
9. Communications between Natives and justice system personnel
10. Post-sentencing treatment, including prison, parole and aftercare (e.g., halfway houses)
11. Native participation in the justice system as professionals and para-professionals

12. Involvement of Native communities in justice programs; e.g., policing, post-release supervision
13. Community specific mechanisms of social control not deriving from the provincial-federal justice system
14. The underlying causes of problems for Natives in the criminal justice system
15. Ways in which problems might be avoided or rectified.

The study did not investigate the question of discriminatory treatment of Natives within correctional institutions.

1.2 Approach

The research concentrated on three Nova Scotia Micmac communities: Shubenacadie on the mainland, and Membertou and Eskasoni in Cape Breton. In view of the project's time constraints, focussed investigation in three communities was judged to be more effective than less intensive study of a larger number of communities. In order to ensure that the focus communities did not differ significantly from those not selected, the latter were visited briefly. With minor variation, criminal justice issues were seen to be the same in Shubenacadie, Membertou and Eskasoni.

Halifax was paid particular attention as it has increasingly become a transient centre for Natives, primarily young adults, leaving their reserves in search of employment. This is a pattern common in most larger Canadian cities and one that has distinct implications for the social well-being of the individuals concerned and for the social and justice services operating in the cities.

Selection of the focus communities was based on three sets of criteria:

1. representation from both the mainland and Cape Breton;

2. differing degrees of geographic isolation from non-Native society: Membertou is a relatively "urban" reserve as it is located within the Sydney city limits; Eskasoni is relatively isolated in central Cape Breton and can be called "rural"; and Shubenacadie can be described as "semi-urban", located adjacent to the town of Shubenacadie in an agricultural area about one hour's drive from Halifax;

3. variation in types of community policing: Membertou is patrolled by the Sydney municipal force; Eskasoni has its own police force; and Shubenacadie is patrolled by RCMP special (Native) constables.

1.3 Information Collection

The research involved four general types of information collection: interviews; document review; statistical review; literature review. Each is described below.

Interviews

The study's primary body of information derived from structured open-ended interviews with individuals and groups in the following categories:

- Native individuals who have been or are currently involved in the criminal justice system (112 total)
- families of individuals involved in the criminal justice system
- Band Chiefs and Councillors
- leadership of the Union of Nova Scotia Indians
- representatives of the Micmac Native Friendship Centre, Halifax
- Native individuals involved in service delivery in Native communities, including:
  - police
  - social workers
  - alcohol and drug counselors
  - employment counselors
  - youth service workers
- defence counsel, particularly legal aid lawyers
- Crown prosecutors
- Provincial and County Court judges
- municipal police and Royal Canadian Mounted Police
- provincial government personnel, including:
  - probation officers
  - correctional centre staff
- parole officers representing Correctional Services Canada (one such interview occurred).

Document Review

A variety of solicited and unsolicited documentation was collected with reference to Micmacs generally, to various aspects of the Nova Scotia justice system and, more particularly, to the involvement of Micmacs in the system. This material was gathered from various government and non-government sources to inform the study in the way of background and current conditions. It is referred to throughout the body of this paper where relevant.

Statistical Review

An inherent difficulty in the use of government statistics concerning criminal justice administration is that the data are not categorized according to the racial origin of offenders. Thus, while published statistics dealing with types of crime, dispositions and sentencing may exist, one cannot precisely determine whether the data refer to Indians or non-Indians.

An attempt was made to overcome this difficulty by examining a random sample of case files in the Sydney and Truro Crown prosecutors' offices. (The Truro office covers the Shubenacadie and Millbrook reserves, and the Sydney office handles Eskasoni and Membertou cases.) In many (though not all) instances, these files contain the prosecutor's information sheet prepared by the police involved in the case, a copy of the prior record sheet of the accused, pre-sentence reports (adult offenders) and pre-disposition reports (young offenders) prepared by Probation Services officers, and other material relevant to the case. Dispositions and sentences are usually marked either in the file or in a card index kept as part of the offices' record systems. The files from which the random cases were selected pertain only to cases that had gone or were going to go to trial, although they included cases for which the plea might have changed to guilty before trial. All files were drawn from the year 1987.

An equal number of files on Native and non-Native cases were selected in both Sydney and Truro. Again, because of the difficulty in precisely identifying the racial origin of the individual accused from file information, the researcher had to rely on office staff and police officers to sort Native and non-Native files. A check on this categorization procedure was achieved by noting the address of the accused; if the address was on a reserve, it was assumed that the file pertained to a Native individual.

Sixty Native files and sixty non-Native files were randomly selected in Sydney and again in Truro. In Sydney this represented approximately 40 percent of the 1987 Native files and three percent of 1987 non-Native files; in Truro, the proportions were approximately 54 percent and four percent respectively. The Truro files included cases from the Millbrook reserve, although this reserve is not one of the focus communities.

The point of the exercise was not to achieve a statistically significant comparison of Native and non-Native files, rather it was to get a general sense of the application of judicial process to Natives and non-Natives in terms of types of charges, dispositions, sentences, and pre-sentence and pre-disposition reports. Unfortunately, due to the variation in completeness of the files and the uncertainty as to the identity of accused as Native or non-Native, conclusions about comparative dispositions and sentencing could not be drawn. The

only sustainable observation arising from the exercise concerns the production of pre-sentence and pre-disposition reports on a comparative basis.

Other statistical data were provided by the Sydney City Police Department and the Royal Canadian Mounted Police, 'H' Division. The RCMP data are produced under the RCMP Operational Statistics Reporting System for the information of local governments, including Band Councils. Of relevance to this study are the monthly data indicating *Criminal Code* charges for each of the three focus communities. This information is presented in Part 3.3 of the report.

Literature Review

In comparison to other areas of sociological/criminological investigation, there has been relatively little research and writing done in the area of Native people in the Canadian criminal justice system, although this has started to change. A "Topical Bibliography" prepared by the Union of Nova Scotia Indians for this Royal Commission indicates an increased rate since about 1980 in the production of relevant papers and articles (UNSI, 1987). There remains, however, very little specific to Micmacs in the system. The most directly relevant paper to date may be one that addresses the issue in New Brunswick (Clark, 1987).

On the international scene, the most innovative work recently has been in connection with the Australian Law Reform Commission. The Commission looked closely at the problems of the aboriginal population vis-à-vis the justice system and at the possible recognition and institutionalization of aboriginal customary law (see The Law Reform Commission, "The Recognition of Aboriginal Customary Laws", Report No. 31, 1986). Relevant literature is cited throughout this report as warranted.

1.4 Notes Regarding Information Collected

The possibility of undertaking a random sample survey of on-reserve Micmac households was considered at the beginning of the planning process for the study. This was ultimately rejected, however, after contact was first made with the communities. First, many reserve households do not have telephones, so a random telephone survey was immediately ruled out. Second, experience indicates that people on-reserve are often reluctant to respond to questionnaires, especially ones dealing with sensitive issues such as criminal offences and incarceration. This was confirmed by a number of community leaders who were approached for advice regarding methodology. It was therefore decided that the best approach would involve contacting individuals who were known to have personally experienced the criminal justice process. Rather than being asked to

answer formal questionnaires, respondents were requested to provide information through a structured, open-ended interview with the principal and associate researchers. The interviews were designed to ensure that certain topics were covered, while allowing the respondent to convey his or her own concerns about the issues. Interviews conducted with justice system personnel used the same approach.

1.5 A Conceptual Basis for Analysis

1.5.1 Discrimination: Intent and Adverse Effects

Discrimination is a paradoxical phenomenon; it may be obvious, but it can be very difficult to prove. Traditionally, this has been a particular problem for the legal system wherein judgments are to be made on the basis of proof supported by substantive evidence. The problem has been not with a lack of observable or obvious discrimination but with the system's definition of what proof is required. Until recently, *intent* to discriminate against another individual or group had to be demonstrated before the courts or any other official tribunal would accept that discrimination had occurred, regardless of the obvious impacts an incident or series of incidents had made on an individual or group. Moreover, while it was difficult to prove the intent to discriminate, in other cases there actually was no intent to discriminate but adverse effects occurred nonetheless. In either event, however, the effects of discrimination (intended or unintended) might have been clear.

The dilemma for the legal and legislative systems in a number of countries, including the United States, United Kingdom and Canada, was that anti-discrimination laws were rather ineffective as long as *intent* was an essential element of proof (Vizkelety, 1987: 13-14). Individuals, groups or organizations engaging in discriminatory practices were not being held accountable through the judicial process.

In the United States in the 1940's and 1950's, the emphasis of proof began to shift from *intent* to the *effects* of discrimination. Yet while this had an effect on those cases that involved discrimination exercised by an individual who was typically motivated by racial prejudice, there remained a significant number of individuals and groups suffering adverse effects. The problem began to be seen as more pervasive than originally thought and a shift in thinking was again required.

"Thus, in the attempt to uncover the sources of persisting discrimination, experts began to focus upon structures and systems rather than on isolated, prejudice-based occurrences." (Vizkelety, *ibid.*, p. 18)

The British followed suit and in the 1970's embarked on a serious examination of policies and legislation concerning discrimination. One product was a paper presented to the Select Committee on Race Relations by the Runnymede Trust. Among other points, the paper argued the following:

"...that the economic and social opportunities of coloured immigrants were much more limited than those of the majority white population as a result of a 'relatively high proportion of immigrants in manual occupations, predominantly of the less skilled kind.'" (Vizkelety, *ibid.*, p. 31, quoting the Runnymede Trust Memorandum to the Select Committee on Race Relations and Immigration)

This point is significant because it explicitly made the connection between discrimination and opportunities provided within the social and economic system for a generalized racial group. (In this connection, see Part 3.1 on the historical context, in this report.)

The memorandum went on to argue related points, as described by Vizkelety:

"...that the approach of past race relations boards had proved inadequate because it was based 'on the premise that discrimination was normally the act of a prejudiced individual, directed against another individual for whom an individual remedy would be effective.' This premise, it continued, had proved unfounded and the remedy ineffective in dealing with 'endemic structural discrimination' against coloured minorities." (Vizkelety, *ibid.*, p. 31, quoting the Runnymede Trust Memorandum.)

Thus, in order to explain and deal with persisting discrimination, the British began to examine "endemic structural discrimination" just as the Americans before them had turned their focus to "structures and systems". One result was the 1976 amendment of the *Race Relations Act* in the United Kingdom to define discrimination in terms of indirect discrimination in addition to the earlier concept of direct discrimination. In so doing, the British integrated the concept of adverse effect into the law.

In Canada clarification of the discrimination question lagged somewhat behind the United States and United Kingdom. Prior to the mid-1980's, *intent* was still viewed "as an essential component of the definition of discrimination, a *sine qua non* element of proof" (Vizkelety, *ibid.*, p. 37). Intent remained an extremely elusive factor to prove. The result, as elsewhere, was a kind of limbo for anti-discrimination legislation.

There were calls for a shift in thinking as early as the 1970's in Canada. Dr. Daniel Hill, for example, commented with regard to institutional discrimination that:

"many of our major institutions - notably our businesses and schools - operate to the detriment or exclusion of racial minorities....[W]hat they do, is not motivated by racism, but it has the same effect." (Daniel G. Hill, n.d.: 15, quoted in Vizkelety, *ibid.*, p. 42)

Vizkelety notes other calls for recognition of the adverse effects concept in the 1970's:

"In 1977 the Ontario Human Rights Commission published a report...in which it warned against the widespread effects of discrimination resulting from unconscious and seemingly neutral practices. Its recommendations eventually led to important revisions of the Ontario Code, not the least of which was the express recognition of the effects concept." (Vizkelety, *ibid.*, p. 42)

The Supreme Court pronounced on the issue in the 1980's, as well. According to Vizkelety,

"[T]he Supreme Court of Canada concluded, first, that 'an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation', and second, that 'adverse effect discrimination' could also be considered a violation of the terms of the Code. The absence of express statutory support did not, the Court noted, in any way hinder such an interpretation of the law.

To arrive at another conclusion, '[t]o take the narrower view and hold that intent is a required element of discrimination' was to place 'a virtually insuperable barrier' in the way of complainants seeking redress from discrimination." (Vizkelety, *ibid.*, p. 52)

The process of rethinking and redefining that has taken place in the past 15 years or so in Canada has led to a change in established law such that intent is no longer a required element in the demonstration of discrimination and that discrimination resulting in adverse effects is unlawful regardless of the fact that it may not be explicitly stated in the country's statutes. As Vizkelety says, the emphasis is now on *effect* rather than *cause*. A concomitant change of equal significance has been the realization that discrimination can emanate from "structural" or "systemic" policies and practices, as

well as from individual sources. It should be pointed out, however, that adverse effects discrimination has yet to be fully tested in the courts (Vizkelety, *ibid.*, pp. 58 and 59).

1.5.2 The Application of the Concept

This study employs the concept of adverse effects discrimination in its assessment of the relationship between Native people and the Nova Scotia criminal justice system. This is for two reasons. First, the identification of adverse effects is the first indication that something might be wrong in the system. Second, as the courts have discovered, reliable evidence showing the intent to discriminate is very difficult to acquire - certainly more difficult than could be reliably achieved in the context of this study.

There is some question as to the working definition of "discrimination" as it applies to the Canadian situation (Viskelety, *ibid.*, p. 77 *et passim*). The cases of discrimination that have come before the courts in Canada and elsewhere have most often dealt with unfair treatment in hiring or in the workplace; the definition as applied by the courts has been framed accordingly. It is therefore necessary to define the concept of discrimination in the context of this study; that is, as it applies to adverse effects for the Native minority vis-à-vis the criminal justice system.

The best definition is a broad one that will account for a range of possible intents, motives, effects, categories of groups and individuals, and short- and long-term implications. Such a definition would, as Zata maintains,

"include indirect and interaction effects of race/ethnicity, operating through other variables. These disparities reflect more subtle *institutionalized biases [than* overt *racial/ethnic discrimination], but still fall within the purview of discrimination if they systematically favour one group over another."* (Zata, 1987: 70)

The following definition of discrimination has been applied in this study: *Discrimination is a specific act, policy or structural factor - intended or unintended - that results in adverse effects for members of certain specified groups*. This definition covers the possibility of discrimination against Native people by individuals, by groups or by the criminal justice system, intended or unintended. If adverse effects exist for Natives that do not exist for non-Natives, then discrimination against Natives has occurred. It remains for the study to explain the nature of the discrimination and the adverse effects, as well as to attempt to identify the causes of problems and possible solutions.

Part 2
The Aboriginal Context in Canada

2.1 Introduction

This part of the report briefly explains the context in which aboriginal issues generally and aboriginal justice issues in particular are dealt with in Canada. This will enable the reader to gain a better sense of the reasons why current conditions exist and how they might best be dealt with. The material in this part relies substantially on information provided by Ian Cowie.

2.2 Overview

Canada

The *Constitution Act, 1982* defines aboriginal people to include Indians, Inuit and Metis. The term Indian is normally used to denote those individuals who have "status" under the terms of the *Indian Act*. "Non-status" people are the group who lost status through enfranchisement or marriage to a non-Indian. Bill C-31 is currently being applied in order to reinstate *Indian Act* status to many women and their children. Metis are descendants of European fur traders and aboriginal women.

There is considerable variation among aboriginal peoples across the country in terms of history, economy, culture, social structure, and political structures. Eleven major language groups and seven culture areas imply differences that cannot be ignored in policy making and program design.

About two-thirds of status Indians live on 2,200 reserves organized into 592 bands with an average on-reserve population of about 400. Most reserves are in rural or remote areas south of 60 degrees latitude. Approximately 40 percent of aboriginal people live in urban areas, although only 30 percent of status Indians do. The aboriginal population is relatively young with 55 percent of Indians in the under 25 age bracket compared to 39 percent for the overall Canadian population. In 1985-86, the approximate populations of aboriginal groups are indicated in the Table at left.

Table 1
Populations of Aboriginal Groups

Status Indians	360,000
(on-reserve)	(252,000)
(off-reserve)	(108,000)
Inuit	29,500

Metis and Non-Status Indians - between 180,000 and 1,000,000
(Source: Statistics Canada 1984)

Nova Scotia

In 1986 the status Indian population in Nova Scotia was approximately 6,600 (UNSI data), comprising 0.9 percent of the total Nova Scotia population and two percent of the national Indian population. Approximately 75 percent of Nova Scotia Indians reside on reserves (higher than the national average). Thirteen bands reside on 38 reserves in the province, the total acreage amounting to 28,000.

The Scope of the Problem

Conservative estimates based on government data indicate that Native people comprise about nine percent of the federal prison population (including 12 percent in federal women's prison) while they total only between two and three percent of the overall Canadian population (Jackson, 1987: 2). Other figures are even more troublesome, as shown by Jackson (*ibid.*, p. 7):

"Infant mortality rate among Indian children is 60 percent higher than the national rate. If an Indian child survives its first year of life it can expect to live ten years less than a non-Indian Canadian. The rate of violent death among Indian people is more than three times the national average. Rates of suicide, especially among young people, are six times the national rate. The likelihood of Indian children being taken out of their family and community and placed under the care of a child welfare agency is five times higher than for non-Indian children. (These reports are based upon government figures cited in the Report of the Special Committee on Indian Self-Government. The Penner Report, Indian Self-Government in Canada, *1983, pp. 14-15)."*

Table 2
Crime rates per 1,000 population on Indian reserves and for Nova Scotia by type of Criminal Code offence for 1985

Criminal Code ("persons")		Criminal Code ("property")		Criminal Code ("other")		Criminal Code (total) (1)	
Res.	Prov.	Res.	Prov.	Res.	Prov.	Res.	Prov.
31.9	5.9	45.2	42.5	67.4	23.0	144.5	71.9

(1) Excludes *Criminal Code* "traffic".
Source: Based on Statistics Canada publication *Canadian Crime Statistics - 1985*, Catalogue 85-205.

Clearly, the social and economic conditions facing aboriginal people in Canada are abysmal. It is widely believed that these conditions are directly related to problems for Natives in the criminal justice system. The historical development of that relationship for the Micmac is explained in Part 3 of this report.

2.3 The Federal - Aboriginal Relationship

Section 91(24) of the *Constitution Act, 1867* confers exclusive legislative jurisdiction on the Federal Government with respect to Indians (i.e., status Indians living on-reserve and off-reserve) and lands reserved for Indians. However, current federal policy regarding status Indians living off-reserve is that provincial governments will take primary responsibility for provision of services. Most on-reserve services are provided directly or indirectly by the Federal Government mainly through the Department of Indian Affairs and Northern Development (DIAND). Band governments administer well in excess of half of DIAND's on-reserve spending (over $500 million per annum). Some services, such as education and child

welfare, are delivered partly or wholly by provincial governments, usually with federal financing. In other sectors, such as health and administration of justice, on-reserve residents often use provincial programs off-reserve.

The instrument for the implementation of federal policy regarding Indians is the *Indian Act*. Section 88 of the Act states that in the absence of federal legislation, general provincial legislation may apply to Indians and land reserved for Indians, in the area of labour codes, for example.

Two general observations are warranted. First, there are long-standing differences of interpretation between the federal and provincial governments on the legal issues involved, as well as program and financial responsibility in specific areas. Second, there are some significant differences in program arrangements and responsibilities across the country for a variety of reasons.

2.4 The Political Environment

There is considerable unfinished business between aboriginal people and the federal and provincial governments. The current agenda between governments and aboriginal peoples is extremely broad and complex. Over the years, solutions to many of the issues that present themselves have eluded governments and aboriginal peoples.

The following is a brief list of priority concerns that have yet to be resolved:

1. The need to resolve outstanding *constitutional issues*, particularly as they relate to the need to define and protect aboriginal and treaty rights, and specifically to recognize claimed rights to Indian government.

2. *Land claims*, both comprehensive (no treaties) and specific (treaty areas), are many and involve significant financial and political ramifications. Progress has been painstakingly slow to non-existent in many parts of the country over the last 10-15 years.

3. *Indian government*: central to constitutional positions and broader Indian aspirations is the need (accepted at one level by most governments) to secure effective recognition of Indian government arrangements.

4. *Conditions in Indian communities:* Indian government is seen by Indian people as a major vehicle for securing control over their own lives. While not fully articulated, and clearly not a panacea response to the disturbing conditions that continue to face many Indian

communities, Indian government is seen as a primary instrument for cultural, social and economic revitalization.

Of particular importance to Indian people is the special "trust relationship" that exists historically and legally between the Federal Government and Indian peoples. Bedded in the Royal Proclamation of 1763, the Treaties and the Indian view of Section 91(24) of the *Constitution Act, 1867*, Indian positions reflect a desired relationship with the Federal Government that would exclude the provincial governments. This does not, however, accord with present day realities.

Federal action and inaction over the years has provided an overriding and continuing sense of mistrust and frustration on the part of Indian people regarding federal intentions and trustworthiness. These feelings have many specific sources, but are based generally on still unresolved claims (on the basis of original occupancy); non-fulfillment of promises made in the conclusions of treaties; non-fulfillment of the specific provisions of the treaties; the promises and approach of the 1969 White Paper; to the present day capping of program expenditures because of fiscal restraint. Indian people continue to be understandably reluctant to believe that the political will is present to address the more fundamental issues outstanding.

The current *Indian Act* reflects much of what is systemically wrong in relation to Indian issues. It assigns dominant and pervasive decision-making powers to the Minister who has the legal ability to control most aspects of the day-to-day existence of Indian people. Indian positions in relation to the *Indian Act* reflect understandable ambivalence. The Act is an anachronism - it must go, but not before agreement on a new relationship has been reached. At the heart of this issue is the need for general resolution of outstanding constitutional issues, including self-government.

While the Federal Government still tries, in many instances, to look for convenient national and provincial level organizations, the requirements for effective consultation encompass groups from the community, tribal, regional, provincial and national levels, depending on the issues involved. Indian people are diverse in history, language, culture, circumstances, needs and aspirations. Notwithstanding general recognition of this fact, the realities flowing from such diversity are often not accommodated with sensitivity in government policies and programs.

There are many outstanding issues involving the provinces. The roles, responsibilities and positions of provincial governments are complex and confused. While involved in providing and financing some services (primarily to status Indians living off-reserve and Metis), a number of difficult issues remain unresolved, including:

• clarity on the respective roles and responsibilities, especially financial, of the federal and provincial governments in many areas where constitutionally assigned jurisdictions overlap;

• controversial continuing involvement by provincial governments in issues affecting Indian lands and resources;

• alleged insensitivity and reluctance on the part of many provinces to adapt general programs to better meet the specific needs of Indian communities.

Many provinces, for reasons of convenience, support Indian positions on the "exclusivity" of the Federal Government's responsibility for all things Indian. Many resent Indian demands on provincial programs and the associated expenditures from provincial revenues. Many resist any further "off-loading" of federal program and financial responsibilities. Many provinces are inherently suspicious and resistant to moving towards recognition of Indian governments, especially at the constitutional level.

Recent history reveals a disturbing inability on the part of governments to involve Indian people, talk together, and achieve minimal cooperation in the planning and delivery of services to Indian communities. Some notable exceptions exist (e.g., the Ontario Tripartite Process) but federal-provincial relations on Indian issues are predominantly characterized and overshadowed by the unresolved issues of roles and responsibilities. This fact, in combination with Indian suspicions and concerns, usually yields inaction, lack of mechanisms for effective dialogue and cooperation and, in the end, lack of change. Predominantly, the political will is not present to address the more fundamental issues in play, and the federal-provincial dimensions merely add further complexity to the problem.

The environment of fiscal restraint that has existed for most of the 1980's has compounded the difficulties inherent in effectively addressing many of the issues identified. Growth rates and modifications in programs have slowed, inequities between Indian communities continue to exist, and little has been achieved in relation to required broad, effective economic development initiatives across the country. Government restraint dictated policies have reinforced continuing suspicion on the part of Indians in relation to the "real" government agenda.

As a direct consequence of the general tendency to fiscal restraint, together with policy objectives to transfer program and financial decision-making to Indian bands, the federal government's main program instrument, DIAND, has lost much of its effective policy

and program capacity at a time when it is most critically required. Moreover, outdated management and program structures leave little promise in areas where Indian bands require support and assistance to meet the needs of the future.

In the end, the overwhelming conclusion is one that reflects the urgency of achieving changes in policies and programs which accommodate with sensitivity the needs, history and legitimate aspirations of the diverse Indian groups. Aboriginal government is critical for the future. We have not settled in a fair and equitable manner an essential component of our political history and fabric as a country. This outstanding area is accompanied and characterized by federal-provincial disputes, lack of cooperation, options for the future which carry major political and financial consequences, diversity of circumstances and positions among Indian people, and increasingly bureaucratic processes for many of the major issues under consideration. All of these factors cumulatively have the effect of inhibiting and, in some instances, precluding any possibilities of real progress in addressing the issues identified.

2.5 The Constitutional Process and Self-Government

The enactment of the *Constitution Act, 1982* saw the insertion of a number of provisions pertaining to aboriginal peoples and their rights:

Section 25

- *provides that aboriginal rights and freedoms are not affected by the Charter of Rights;*

Section 35

- *defined aboriginal peoples to include Indian, Inuit and Metis;*
- *recognized and affirmed their aboriginal and treaty rights;*

Section 37

- *provided for a conference of First Ministers, representatives of the aboriginal peoples (and the Territories) to consider matters including an identification and definition of rights.*

After the prescribed three conferences (1983, 1984-85 and 1987), the questions of aboriginal rights and self-government were unresolved. Given the lack of agreement at the constitutional level and under increasing pressure from Indian people at the community level to start moving towards self-government arrangements, the Minister in April 1986 released a statement detailing a federal policy for negotiating Indian self-government at the community level at the same time as constitutional discussions were proceeding. While the

constitutional talks appear to have ended, the community negotiations policy remains intact. Tangible results are not yet forthcoming, partly because the design and negotiation of self-government structures and new federal-aboriginal relations is a complex task that will take considerable time. (As of July 1988, 255 bands were involved in the process.) As well, there is the ongoing provincial unwillingness to take part in the process.

2.6 Aboriginal Peoples and Criminal Justice Administration

2.6.1 The Legal Context

(a) Constitutional Authority for Criminal Law

The general power in relation to the criminal law rests with the Federal Government: "The criminal law except the constitution of courts of criminal justice but including the procedure in criminal matters" (Section 91 (27) of the *Constitution Act, 1867*). The definition of what constitutes criminal law is broad. Thus, by virtue of its criminal law power, Parliament can enter fields of legislative activity over which it does not otherwise have jurisdiction. Section 92(15) authorizes a limited provincial involvement in the field of criminal law.

(b) Constitutional Authority for Administration of Justice

The *Constitution Act, 1867* expressly confers the jurisdiction over administration of justice on the provinces. This provision covers both civil and criminal justice. The provincial power does not include criminal procedure which is expressly allocated to Parliament under Section 91(27).

It should be noted that it is an established principle of Canadian constitutional law that any legislative power carries with it a matching power of administration and enforcement. Therefore, Parliament has a concurrent jurisdiction over the administration of justice in respect to criminal matters, and in respect to civil matters over which it otherwise has competence; i.e., trade and commerce, marriage and divorce, etc.

Specific provision is made for prisons, reformatories and penitentiaries under the *Constitution Act, 1867*. Section 92(6) authorizes provinces to legislate in relation to: "The establishment, maintenance and management of public and reformatory prisons in and for the province." Section 91(28) empowers Parliament to make laws in relation to: "The establishment, maintenance and management of penitentiaries." The Federal Government has the power to appoint judges to the Superior Trial Courts and the Appeal

Courts of the provinces (Section 96), and to establish courts, except courts of criminal jurisdiction (Section 101).

(c) Distribution of Powers Relating to Administration of Justice

While there is not total clarity in the case law, the balance of opinion confirms the doctrine of federal paramountcy in this area vis-à-vis Indians based on Section 91(24), with a corresponding ability on the part of the Federal Government to oust any otherwise valid exercise of provincial jurisdiction pursuant to other constitutional heads. The courts have held that there is a federal power to legislate in relation to the administration of justice on-reserve even though the administration of justice is generally a subject within provincial jurisdiction.

No provision of the *Indian Act* has ever been struck down as *ultra vires* the Federal Government because of encroachment upon provincial powers. The *Cree-Naskapi Act*, S.C. 1983-84, c. 18 demonstrates the exercise of such federal jurisdiction in relation to policing and other questions pertaining to the administration of justice.

(d) Comments

The justice system in operation is a complex interweaving of the federal and provincial jurisdictions mentioned above. For the future, it seems that federal law is supreme on lands reserved for Indians to the extent that Parliament so legislates by virtue of its Section 91(24) authority. As a result it is arguable, for example, that no provincial law may directly or indirectly interfere with a duly enacted "federal" self-government regime on "lands reserved for the Indians", including provisions relating to the administration of justice.

In reality, practical considerations will temper these absolute legal concepts, especially in areas relating to administration of justice. In particular, because of current shared funding arrangements and current shared jurisdiction, the active cooperation of provincial authorities will be essential to the effective exercise of future aboriginal legislative authorities relating to justice matters.

In summary, the Federal Government's technical capacity to unilaterally enact new Indian self-government legislation, which could encompass justice matters, will likely be replaced as a matter of practicality by a requirement, especially in areas relating to the administration of justice, for concurrent and complementary federal and provincial legislation. This is demonstrated to some extent in the legislative requirements agreed to in both the Cree-Naskapi and the Sechelt self-government situations.

Part 3
The Mi'kmaq Context

3.1
Introduction to the Historical Context

An understanding of the historical relationship between Micmacs and Whites in Nova Scotia is essential for two reasons. First, it helps to explain the causes underlying current Micmac socio-economic conditions and political relationships within the wider system. These conditions and relationships have a significant bearing on issues surrounding Indians in the criminal justice system. Second, the past, as manifested in realities such as the Treaty of 1752, will inevitably have a significant bearing on any attempts to improve the relationship between the Micmac and other governments, especially in areas such as criminal justice.

The following analysis is general in the sense that it covers social, economic, political and legal issues. More specifically, it assesses the implications of each of these related categories for the involvement of Micmacs in the criminal justice system. The analysis relies on various sources, most notably the following:

- *Fred Wien's (1986)* Rebuilding the Economic Base of Indian Communities: The Micmac in Nova Scotia;

- *Lisa Patterson's (1985)* M.A. Thesis; Indian Affairs and the Nova Scotia Centralization Policy;

- *Interviews with various Micmacs, and in particular with:* Alex Denny, Deputy Grand Captain, Grand Council of the Mikmaw Nation; Bernie Francis of Membertou; Joe B. Marshall of Membertou and with UNSI; and Sakej Henderson of Eskasoni.

3.2
The Process of Economic Underdevelopment

Wien (1986: 6) identifies five major periods in Micmac economic history, Table 3.

Table 3
Micmac Economic History

Approximate Dates	Principal Characteristics
Up to 1500	Aboriginal subsistence patterns; community production and consumption
1500 to 1783	Early European contact and the fur trade
1784 to 1867	Transition to settlement and subordination
1868 to 1940	Labour in the industrial economy
1941 to present	Centralization, welfare, and government dependence

This pattern corresponds to the history of most other Indian nations in Canada. The brief list of characteristics tells the story of a society radically altered in a relatively brief time as the result of relations with non-aboriginal economy and government. While this report will not expand on the earlier periods in Micmac history, it is worth emphasizing that the historical process since 1500 has led in Micmac terms to increasing dependence on non-aboriginal institutions and to increasing underdevelopment of Micmac society. With respect to criminal justice issues, it is important to focus on the

most recent major periods, from 1868 to 1940 and from 1941 to the present.

The process of confining Micmacs to reserved lands that had started early in the nineteenth century continued in the latter part of the century. In the colonial administration's attempt to clear the way for non-Indian agricultural settlement, Indians were discouraged from practicing their semi-nomadic hunting, fishing and gathering economy and were urged to settle - as communities - on small, usually non-arable parcels of land. The total reserve land presently allocated for the thirteen Nova Scotia Bands is 28,885 acres (DIAND, Atlantic Region), not much more than the 22,050 acres identified in 1842 (Wien, 1986: 16).

In 1876 the *Indian Act* was passed and in 1880 the first federal department exclusively responsible for Indian affairs was established. As Wien points out, this began an ever increasing trend to financial and administrative control of Indians by the Federal Government (*ibid.*, p. 20), intended to assimilate the Indian population into the sedentary, agricultural economy of the non-Indians.

Micmacs managed to occupy a marginal economic niche in the industrial boom period of the 1910's and 1920's. They worked as wage labourers in the lumber, mining, ship loading, agricultural and construction industries. As well, many managed to specialize in particular self-employment areas such as masonry and basket making. With the onset of the Depression in the late 1920's, however, Micmacs were suddenly faced with serious unemployment, in terms of both wage labour and self-employment.

Micmacs suffered more than non-Indians during these years. First, they "by and large occupied more marginal and vulnerable positions in the economy than did much of the non-Indian labour force" (Wien, *ibid.*, p.28) and, second, they were viewed by non-Indians (including employers) as wards of the state who would be looked after during the hard times (Wien, *ibid.*, pp. 28-29). In terms of unemployment, the only respite during this period was the voluntary enlistment of a large number of Micmac men in the armed forces either to serve overseas or in the reserves or militia. According to Wien,

"The stage is set, then, for the transition to a new period in the economic history of the Micmac. Beginning in the 1940's, the hallmarks of the new period are the extensive intervention of the federal government and the unparalleled use of welfare payments as the main public policy response to the difficulty the Micmac were increasingly experiencing in the labour market." (*ibid.*, p. 30)

The period from 1941 to the present - the period of "centralization, welfare, and government dependence" - has seen the continuation of pressures on the Micmac to remain largely isolated from the Nova Scotia economy and to depend on governments, particularly federal, for survival.

As early as 1927, an apparently arbitrary process of relocating Indians had started in Sydney. The Micmacs of Membertou, who had refused to leave a two acre reserve on King's Road leading into Sydney, were moved onto a more isolated and less desirable parcel of land where the reserve now exists.

However, better defined policies of relocation and dependence were to develop after 1940. Wien effectively summarizes the process:

"In the period following 1940, the federal government began to play a very significant role in the lives of the Micmac. Increasingly concerned by rising unemployment and welfare costs, the government's response to the situation took two forms. First, it attempted a major consolidation and centralization of reserves in the province on the grounds that economies of scale would result and that the larger communities could become self-sustaining economic and social units. When this policy proved to be a failure, a fact that was evident by the early 1950's, the dominant public policy response was to buy off the problem, initially by the extensive provision of welfare and other forms of income security and, in more recent years, through the expenditure of public funds to create jobs." (*ibid.*, p. 31)

On the recommendation of Indian Agent A. S. Arneil, the Federal Government officially adopted a centralization policy in 1942. The forty reserves scattered across the province were to be consolidated at two locations: Eskasoni on Cape Breton and Shubenacadie on the mainland. As Patterson points out, these reserves were relatively removed from centres of White population (*ibid.*, pp. 54-57); however, they were close enough to Halifax and Sydney that they could be managed by government administrators without much difficult travel. In terms of arable land and other resources, Eskasoni and Shubenacadie were poor, a factor that is consistent with the history of Indian relocation across the country.

The policy was based to a large degree on paternalistic reasoning and was coloured by moralistic and racist attitudes, as indicated by Wien. Patterson, for example, cites the Eskasoni Indian agent MacLean in 1944 as telling the Bishop of Antigonish "that centralization was 'the nearest solution' to making the Indian 'a decent chap,' and that 'if developed, [the Micmacs are] one of the

greatest tourist attractions the province has to offer'" (*ibid.*, p. 76).

Attractive inducements were suggested by Indian Affairs agents to get Micmacs to relocate from their scattered reserves where they often lived with no work and no services provided. Jobs, schooling, medical services, new homes, churches with priests, and farms with livestock and implements were promised. Many people moved and initially, at least, new jobs were created. However, once the building activity created by the relocation died down, the number of jobs declined dramatically. By and large, Indians still were not hired outside their reserves. As well, the extent of traditional activities declined, thus removing an important component of the Micmac adaptive economy.

On the other hand, certain of the aims of the Indian Affairs bureaucracy were realized through centralization, as described by Wien, below, with regard to Eskasoni. These developments had distinct implications for the social and political context in which Micmacs live today, including their relations with the criminal justice system by virtue of their long-term effects on social conditions:

"With centralization, control of community affairs shifted to non-Indian hands. In law enforcement, for example, an RCMP officer and the Sydney court system began to be used, taking disciplinary measures out of Indian hands. In the health field, a nursing station was established and the more permissive Indian child-rearing patterns were interfered with. Bottle feeding of infants replaced breast feeding, and births were now expected to take place at the hospital in Sydney. Band government had been exercised by a traditional chief and, in more recent decades, by the more central family heads, but they were replaced by the Superintendent of Indian Affairs and his local Indian agent, who had the power to decide any civil or criminal matter. In matters of religion, the reserve now had a resident Catholic priest who looked after the organizing of religious services, a function previously performed by the elders of the community. The priest and several nuns were also put in charge of the reserve-based school, which in 1949 catered to 161 pupils in grades one through nine. Steen [a researcher visiting the community] reports that the nuns directed a vigorous campaign, aimed at both the children and their parents, to encourage the use of English rather than the Micmac language, which was the only language spoken at home." (Wien, *ibid.*, p. 34)

Opposition to centralization was voiced by many Micmacs during the 1940's on the basis that it was counterproductive and "unfair." Indeed, by the mid-1940's even federal representatives were openly doubting the worth of the policy. By the mid-1950's, Wien notes, the

resettlement program was an obvious failure, and as early as 1949, "at least half of the Micmac population had moved back to their original reserves" (*ibid.*, p. 36).

The return to smaller reserves was not particularly successful for most people, as the patterns of economic adaptation that had existed prior to resettlement were disrupted, due in part to the depletion of and declining access to natural resources. As well, off-reserve employment was even harder to find in the 1950's than it had been in earlier decades. For those remaining at the larger reserves, Eskasoni and Shubenacadie, the influx of people without concomitant economic development had left a state of unacceptably substandard living conditions (Patterson, *ibid.*, p. 124). Alcohol abuse was becoming an acute symptom of the despair resulting from economic and social breakdown.

The Indian Affairs Department, recognizing the failure of its centralization policy, moved to divide the "Micmac band of Nova Scotia" into separate bands so that the Micmacs could vote more easily on the disposal of reserve land and trust funds held by the Department. However, the Department would not offer to assist those who wished to move back to their pre-centralization reserves (Patterson, *ibid.*, pp. 125-128). The choice for the individual Indian family was one of remaining at Eskasoni or Shubenacadie in poor living conditions, or moving to their earlier reserves where they no longer had houses.

In the aftermath of the centralization policy failure, the Federal Government resorted to increasing its welfare payments and related income security programs to counter the effects of an essentially non-existent economy on the reserves. Beginning with the revision of the *Indian Act*, band governments were given increasing degrees of control over reserve administration. As Wien points out, "in recent years, in fact, the band councils have become the largest employers of the on-reserve labour force" (*ibid.*, p. 37), accounting for jobs in administration, housing development, community works, education, counselling, and other endeavours.

The government has also sponsored provincial and regional level Native organizations to handle social, economic and political requirements of Indian people. The Union of Nova Scotia Indians, the Native Alcohol and Drug Abuse Counselling Association, the Native Women's Association, and the Micmac Friendship Centre in Halifax are examples. As well, the Federal Government has funded make-work projects in many Indian communities that have become an important component of the economic system of those communities. Similarly, federal funding has been injected to a certain extent into band controlled and individual economic development

enterprises, thus contributing indirectly to job creation (Wien, *ibid.*, p. 37).

In light of the continuing scarcity of off-reserve employment for Micmacs, Wien points out that:

"By 1980, fully two-thirds of the on-reserve labour force was directly or indirectly dependent on federal funds for their work, and virtually everyone outside the labour force or without employment was in receipt of welfare payments or other forms of income security." (*ibid.*, p. 37)

It should also be noted that the creation of general conditions of unemployment and dependence for the Micmac is tied to the decline of traditional economic pursuits such as hunting, trapping and gathering. The decline is the likely result of a number of factors, including resource depletion through industrialization, regulatory restrictions imposed by the Provincial Government, and a tendency to depend on welfare that has developed in Indian communities over the years. This situation is a familiar one across Canada and is constantly being addressed by Native organizations such as the Union of Nova Scotia Indians in their dealings with federal and provincial governments.

Micmacs still manage to fill an economic niche in the overall economy through their ability to adapt to changing circumstances and to use their limited resources to achieve the greatest possible degree of self-sufficiency. However, as Wien shows, "Centralization, welfare dependence, and publicly funded employment are the most prominent features of the period from 1940 to 1980" (*ibid.*, p. 38). The process has had significant implications for the current poor social conditions, and therefore for the Micmac relationship to the criminal justice system.

3.3 The Present Context

3.3.1 Basic Demography

Micmacs of Nova Scotia defined by the *Indian Act* as "status Indians" comprise thirteen bands and in 1986 a total population of 6,617 individuals, corresponding to 0.9 percent of the total Nova Scotia population (UNSI data for 1986). Table 4 indicates male and female populations for each reserve and Figure 1 shows Nova Scotia Micmac male and female populations by age group (both sets of figures identify band members, whether on- or off-reserve). Micmacs represented by the Native Council of Nova Scotia and living off-reserve number approximately 4,400 individuals. (Note that there is some overlap in political representation of status and non-status Micmacs as the Native Council of Nova Scotia represents all

Table 4
Nova Scotia Band Populations
December 31, 1986

Band	Male	Female	Total
Acadia	197	204	401
Afton	109	148	257
Annapolis Valley	56	52	108
Bear River	56	57	113
Chapel Island	125	140	265
Eskasoni	1,014	1,010	2,024
Horton	37	53	90
Membertou	247	276	523
Millbrook	221	257	478
Pictou	166	156	322
Shubenacadie	558	586	1,144
Wagmatcook	200	198	398
Whycocomagh	238	256	494
Total	**3,224**	**3,393**	**6,617**

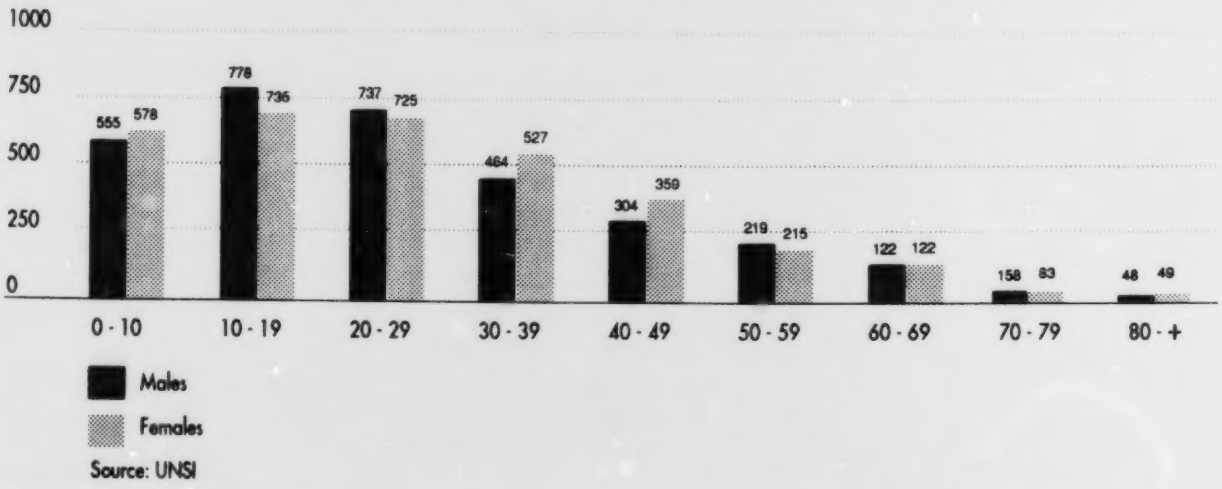
Source: UNSI

Micmacs living off-reserve, whether they are status or non-status. Hence, the Native Council's constituency numbers somewhat more than the non-status population of the province.)

Micmacs in Nova Scotia have tended not to move to the cities to the same extent as Indians in other provinces such as Saskatchewan and Ontario. The Native Council estimates that the aboriginal population in Halifax is between 300 and 400 individuals. These numbers are significant, however, especially when it is recognized that these people have needs unlike other city dwellers and unlike Micmacs living in reserve communities.

The recent population growth among status Micmacs has been relatively rapid; between 1966 and 1981, for example, the population grew between 12 and 15 percent every five years - between two and three times the rate for the non-Indian population during the same period (Wien, 1986: 43). As Wien points out, the Micmac growth rate increased rapidly due to a high birth rate (which has more recently decreased) and a declining mortality rate (due, in part, to improved health care). As Figure 1 indicates, this trend has resulted in a very young population.

Figure 1
Population Break-Down in Age Groups • Nova Scotia Indians • December 31, 1986



Source: UNSI

A young and changing population means two things: first, that there are a high number of dependents in the communities; and second, that there is considerable pressure on band governments and the Federal Government to provide programs, services and especially, employment (Wien, *ibid.*, p. 45). Government success in the latter category has been limited. Wien puts the 1981 employment rate among on-reserve Micmacs ("on-reserve" is somewhat over 70 percent of the Micmac population at any given time) at the following levels: employed - 49.2 percent; unemployed - 50.8 percent (*ibid.*, p. 61).

The research for the Royal Commission's study did not involve an employment survey; however, unemployment rates were unofficially quoted by band representatives at over 80 percent on every reserve. The discrepancy between the figures presented by Wien and those suggested by the bands likely results from different methods of calculating employment and unemployment. Wien's figures may be the more significant because they are based on Statistics Canada methods of calculation and can be used comparatively with other parts of Canada. (The calculation is based on the unemployed as a proportion of the labour force; the labour force comprising those working and those unemployed looking for work. The problem with this method of calculation on-reserve is that the employment situation is so poor that "looking for work" is a meaningless term; consequently, many people are excluded from the Statistics Canada definition of unemployed because they are not "looking for work".) Clearly, even Wien's conservative estimates of on-reserve unemployment at 50.8 percent are extremely high compared to national rates that cause outcry above seven or eight percent.

The jobs that do exist on-reserve are almost exclusively through the Bands - administration, program management, construction and maintenance - as well as through federal job creation projects. Among on-reserve Micmacs in 1980, Wien cites the extent of reliance on social assistance at 64.5 percent, while 35.5 percent did not rely on social assistance. This situation may have worsened between 1980 and 1987, as suggested by band representatives; however, accurate, updated data were not obtained for this study.

The social conditions on Micmac reserves are unacceptably poor. Consistent with trends across Canada, Micmac households have lower incomes and lower living standards than non-Indian households. Similarly, suicide rates and incarceration rates are significantly higher than in the non-Indian population, particularly among the young. Many attribute these facts to the lack of opportunities and the poverty that young Indians face.

3.3.2 Political and Administrative Organization

As indicated above, there are 13 Bands in Nova Scotia. Each Band Council comprises an elected Chief and Councillors, dependent on the individual community's population (one Councillor per 100 Band members, according to the *Indian Act*). Band Councils are supported by limited bureaucracies which are organized to administer Band affairs and to manage federally funded programs such as employment counselling and housing. In the case of most Nova Scotia Bands, federal departments (primarily the Department of Indian Affairs and Northern Development) control the majority of services through direct funding and management.

Until recently, the Union of Nova Scotia Indians (UNSI), which is based on Membertou Reserve, represented all 13 Bands in a political capacity, acting on their behalf on matters such as hunting and fishing rights in which the federal and provincial governments were involved. UNSI also plays a coordinating role among Bands on political issues, and attempts to educate both Micmacs and non-Indians regarding social, economic and legal issues facing the Micmac. In 1986-87 a new group, the Confederacy of Mainland Micmacs, formed parallel to UNSI. This organization, which is based on Millbrook reserve near Truro, represents six mainland Nova Scotia Bands.

The Native Council of Nova Scotia is an elected body based in Truro. While it has a significant constituency (all Natives living off-reserve), the Native Council does not have access to funds or programs offered to the Bands by the Department of Indian Affairs and Northern Development. Consequently, the Native Council must either tap existing programs that have been established without any particular concern to meet aboriginal needs, or seek non-DIAND sources of funding in order to initiate its own programs. Both approaches are difficult.

UNSI and the Confederacy are important in the area of criminal justice because they hold the potential to act on behalf of member Bands in the development of policies and programs. Their contributions may take the form of negotiating for bands, and/or coordinating development work and lending the expertise present within the organizations. In the event of new province-wide programs for Natives, UNSI and the Confederacy have the capability to manage such programs on behalf of the Bands. Similarly, the Native Council of Nova Scotia should play an important role in any policy and program development on behalf of those Native people living off-reserve, many of whom experience the same problems in the criminal justice system as their on-reserve compatriots.

Nova Scotia Bands have thus far chosen not to engage in the "self-government negotiations" process initiated by the Department of

Indian Affairs and Northern Development and leading potentially to new legislation for Indian self-government. Instead, they are attempting, against great odds, to build community self-reliance through the development of community controlled social programs and economic enterprises within the framework of existing legislation.

Adversarial interaction with non-Indian governments has been limited primarily to the control of child welfare services and to hunting and fishing rights cases. The latter are being addressed with a view to legislative and policy changes in favour of aboriginal land and resource use. UNSI has been especially active in these areas.

As well as UNSI, the Confederacy and the Native Council, Micmac communities are linked to a long-established organization known as the Grand Council of the Mikmaw Nation. The Grand Council was set up to act as the bridge between the Micmac people and the Roman Catholic Church in Nova Scotia. It comprises well respected representatives from the various communities and actively plays a role in counselling individual Micmacs and their community governments on a wide range of matters. Unlike the Band Councils, UNSI and the Confederacy, the Grand Council has no ties to non-Indian governments for its mandate or for its funding. The potential of the Grand Council for input to the design and management of new policies and programs vis-à-vis Micmacs in the criminal justice system is substantial for two reasons: first, the expertise residing in its membership; and, second, the high degree of respect it commands from Micmacs throughout the province.

3.3.3 Selected Community Profiles

In this section, a brief description of the current situation in each of the three focus communities will be presented. This will include an outline of the social services provided, as well as an indication of the types and extent of criminal activity.

Shubenacadie

The Shubenacadie reserve (more properly known as the Indian Brook reserve) comprises 1,144 individuals. It is categorized as the "semi-urban" community for purposes of the study and is located approximately 60 kilometers north of Halifax and adjacent to the agricultural town of Shubenacadie. The Chief and Councillors are elected on a regular basis according to the electoral provisions of the *Indian Act*, as they are in Membertou and Eskasoni.

As on other reserves, the unemployment rate is high at Shubenacadie. The community bears out Wien's observation that the

largest single employer is the band administration itself, relying, of course, on federal funding.

Social services are provided from offices on-reserve. These include the following:
(i) the Native Alcohol and Drug Abuse Counselling Association, with at least two counselors, a Youth Services counselor and a Director;
(ii) Social Services, with a staff of social workers and a director; and
(iii) Employment Services, with a counselor and a Director. Children must attend school in the town of Shubenacadie.

Policing on the Shubenacadie reserve is the responsibility of the RCMP. Three Micmac men from the reserve have been appointed and trained by the RCMP to be "Special Constables" under the Option 3(b) program.

Table 5 shows the type and extent of *Criminal Code* activity among residents of Shubenacadie during 1987. The figures indicate a high proportion of assaults relative to other personal and property categories. Other *Criminal Code* offences, primarily disturbing peace, are also relatively frequent.

Incidents are handled by the Stewiacke Detachment of the RCMP, most often by the three Special Constables who reside on the reserve. Provincial Court sits in the town of Shubenacadie. Legal aid is provided by the office in Windsor and, to a lesser extent, by the office in Truro.

Table 5
Criminal Code Incidents • 1987 • Shubenacadie Reserve

Category	Offence	Assist Report*	Reported	Actual	Cleared by Charge	Cleared by Other
Persons	Att. Murder		2	2	2	
	Homicide					
	Sexual Assaults		1	1	1	
	Other Assaults	2	42	40	20	10
	Other		1	1	1	
	Total Persons	2	46	44	24	10
Property	Break & Enter	1	6	5	5	1
	Theft M.V.	3	3	3	3	1
	Theft > $1000		1			
	Theft < $1000	6	8	6		3
	Other	1	8	6	4	2
	Total Property	11	26	20	12	7
Criminal Other	Offens. Weapons		6	6	4	1
	Other Crim. Code	1	66	59	32	12
	Total Crim. Other	1	72	65	36	13
Crim. Code Traffic						
Total Criminal Code		14	144	129	72	30

*Assistance provided to another RCMP detachment or police force.
Source: RCM Police, Operational Statistics Reporting System, 'H' Division.

Membertou

Membertou is the most urban of the three focus communities as it is located close to the Sydney city core. With a population of 523, it is smaller than either Shubenacadie or Eskasoni, yet it has the same social services enjoyed by the larger communities. Specifically, it has a Native Alcohol and Drug Abuse Counselling Association program, an employment counselling service, and social workers. Membertou children must attend school off the reserve in Sydney.

Policing on Membertou is the responsibility of the Sydney City Police, since the reserve is located within the city limits. Provincial and County Courts sit

Table 6
City of Sydney Police: Membertou Responses and Charges • 1987

Calls to Membertou Reserve	**172**
Charges - on Reserve	
Criminal Code	16
Liquor Control Act	12
Motor Vehicle Act	6
Total	**34**
Charges - of Natives in City of Sydney*	
Criminal Code	16
Liquor Control Act	68
Motor Vehicle Act	31
Food and Drug Act	1
Narcotics Control Act	2
Total	**118**

* includes Natives from Membertou and elsewhere

Source: Sydney City Police data provided to researcher 1988.

in Sydney and legal aid is provided from the Sydney office.

Data provided by the Sydney City Police was limited to the number of calls to the reserve in 1987 and the number of charges against Native people in Membertou and in Sydney, as indicated in Table 6. On reserve, *Criminal Code* charges are slightly higher than other kinds of charges (*e.g. Liquor Control Act* and *Motor Vehicle Act* violations). For Natives charged in the city of Sydney but off the reserve, *Liquor Control Act* offences are the most common.

Eskasoni

Eskasoni is the largest reserve in Nova Scotia with a population of 2,024. For purposes of this study, it is categorized as "rural" as it is located about an hour's drive from Sydney with no town of any significant size nearby. Its relative isolation enables Eskasoni residents to engage in hunting and trapping somewhat more than the people on most other reserves, including Shubenacadie and Membertou.

The social services described for the other communities are also provided in Eskasoni; that is, alcohol and drug abuse counselling, social worker services, and employment counselling. In addition, Eskasoni is the site of Mi'kmaw Lodge, the Native Alcohol and Drug Abuse Counselling Association's treatment centre for all Micmacs. Eskasoni children are able to attend school through grade nine on the reserve in facilities and under programs controlled by the community.

Table 7
Criminal Code Incidents • 1987 • Eskasoni Reserve

Category	Offence	Assist Report*	Reported	Actual	Cleared by Charge	Cleared by Other
Persons	Att. Murder					
	Homicide	2				
	Sexual Assaults		5	5	2	2
	Other Assaults	5	60	56	17	35
	Other Total Persons	7	65	61	19	37
Property	Break & Enter		19	15	4	7
	Theft M.V.		7	3	2	1
	Theft > $1000		2	1		
	Theft < $1000	6	48	38	5	16
	Other		2	2	1	
	Total Property	6	78	59	12	24
Criminal Other	Offens. Weapons		9	7	5	2
	Other Crim. Code	5	152	126	33	76
	Total Crim. Other	5	161	133	38	78
Crim. Code Traffic		3	37	32	28	
Total Criminal Code		21	341	285	97	139

*Assistance provided to another RCMP detachment or police force.
Source: RCM Police, Operational Statistics Reporting System, 'H' Division.

Table 7 indicates the types and extent of criminal activity in Eskasoni. The data are similar to those for Shubenacadie, except that the frequencies are greater, as would be expected for a larger population.

Policing is the responsibility of the Eskasoni Police, comprising a Police Chief and up to four trained and armed officers. The police force is responsible to the Eskasoni Band Government, although reporting

is also done to the RCMP who provide back-up when requested and who sometimes take over custody of offenders for the trip to jail in Sydney. Eskasoni residents attend court and get legal aid assistance in Sydney.

3.3.4 Concluding Notes

The social conditions in Nova Scotia Micmac communities are generally unacceptable by national standards. Their worst manifestations are high rates of alcohol and drug abuse, family break-ups, school drop-outs, and suicides, particularly among the young (Jackson, 1987). The causes of these conditions are rooted in an historical process of underdevelopment which perhaps has been most damaging to Micmac economy and society during the period from 1940 to the present. We can now examine the way in which Micmacs are dealt with by the justice system in light of their social, economic and cultural circumstances.

Part 4
Mi'kmaq and the Criminal Justice System

4.1
Introduction

This part of the report examines the question of adverse effects for Native people through their involvement in the criminal justice system in Nova Scotia. It is based on information collected by various means, as described above, but especially through interviews with Micmacs and justice system personnel.

The importance of identifying *community-specific problems and needs* is critical. Potentially each community is faced with circumstances which make it unique. These circumstances are of two types: first, structural facts such as the type of police service being provided; second, indigenous factors such as the nature of the community's informal dispute resolution process. Natives living outside their communities introduce even greater variation to the picture. The potential for community-specific (or group specific) problems and needs suggests the significance of identifying each clearly and then developing relevant *community-specific solutions*. In the end it may be that there are certain commonalities among communities and groups, in which case general solutions might apply. Certainly, it should be possible to establish carefully crafted policy and program frameworks that can accommodate community variation. Unfortunately, the history of aboriginal program development (primarily by the Department of Indian Affairs and Northern Development) often has not accounted for the possibility of differences among communities; and often the results have been disastrous.

It was stated in the Introduction to this report that the study was limited in its coverage of communities and in its work with people living off-reserve. As a result, the uniqueness of some communities will have been missed. It is therefore important that any process initiated to deal with aboriginal justice issues in Nova Scotia recognize that work must be done on a community-by-community basis.

The analysis is based on a framework that first examines the structural factors affecting communities and off-reserve people and the implications of those factors for the same groups. It then briefly looks at indigenous community-based justice mechanisms now in place.

This section on structural factors includes the issues of criminal justice processing (policing, sentencing, probation and parole, and aftercare) and access to justice (legal representation and hearings and trials). The treatment of Natives in correctional institutions is not examined as a separate category, although interviews were held with groups of Native inmates at provincial and federal institutions with regard to their experiences with other parts of the system.

The focus is on systemic or structural discrimination resulting in adverse effects, not on personal discrimination. Instances of the latter

type were raised throughout the interviews by Micmacs and, to a lesser degree, by justice personnel. According to the respondents who provided examples, in its most drastic form, personal discrimination arises as unwarranted assaults by police. There are problems in dealing with this phenomenon from a research perspective, however. First, individual instances of acts such as police beatings are difficult to corroborate or replicate through later research, especially since respondents are generally reluctant to sign statements swearing to the validity of their claims for fear of reprisal. Second, incidents such as police assaults may not happen only to Natives, but also to other socially disadvantaged people regardless of race. In this case, perhaps poverty is a critical factor instead of, or in addition to, race. Given limitations on the study's scope, it was not possible to research discrimination against non-Native groups. Thus, a comparative basis for acts of personal discrimination such as police assaults could not be established with certainty. Particularly in view of the reluctance by respondents to sign statements attesting to such incidents, it is difficult to draw direct conclusions regarding instances of personal discrimination in this report. Suffice it to say that I believe that respondents were, by and large, honest in their verbal statements that acts of extreme personal discrimination do occur against Micmacs.

It is important to understand the nature of criminal offences in Native communities. As Moyer *et al* (1985) have indicated, a high proportion of Native offences are alcohol related. The accompanying charges often refer to violations of liquor ordinances or to relatively minor *Criminal Code* offences such as property damage, break and enter and/or theft. While this varies among regions and communities throughout Canada, it is generally safe to say that this pattern holds in Nova Scotia. This is especially important in terms of police operations, sentencing and probation. Depew (1986) has suggested that police over-charging on reserves may result, in part at least, because police officers have little or no alternative to incarceration when an Indian is causing trouble due to drinking; alternative facilities are generally non-existent. Similarly, as I suggest below, judges in Nova Scotia are often faced with three inappropriate options in their decisions: incarceration, discharge, or probation with a requirement for treatment that is not designed to deal with the offender's problem. Relevant options are limited because of an absence of support facilities aimed at Natives.

4.2.1 Policing

The three focus communities are each represented by a particular type of police force:

Shubenacadie
- RCMP Special Constables (the so-called Option 3(b) program);

Membertou
- Sydney Police;

Eskasoni
- Eskasoni Reserve Police, in conjunction with RCMP from Sydney.

The Role of Police

There are differing opinions among both Micmacs and justice system personnel as to the roles of police in Native communities. Simply stated, the issue is the degree to which police are presently able to serve the needs of the community. Generally, the question is framed this way: should police act as strict enforcers of the law or should they take a more preventative and mediative approach. Most Micmacs see the latter as more in line with long-standing mechanisms of Micmac social control, as well as more appropriate to the community's needs. Justice system personnel, who are generally unfamiliar with the concept, tend to be skeptical but allow that the possibility of moving in this direction is worth studying. (This cannot be said for the Sydney City Police or the RCMP, who would prefer to maintain the existing enforcement regime. The Eskasoni Reserve Police already operate largely according to community principles of prevention and mediation.)

The uncertainty surrounding this question on the reserve is manifested in a tendency to non-reporting of offences, a phenomenon that is common across the country in Native communities. Significantly, among the three focus communities the tendency appears to be greatest in Membertou, which is the only community policed by non-Indian officers. Membertou administrators, other residents and the Sydney City Police all confirmed that officers are called onto the reserve only on particularly serious occasions or when one individual is carrying on a grudge with another. Among the focus communities, Eskasoni interview respondents indicated the greatest likelihood to report incidents to the police - in this case, the Eskasoni Reserve Police.

The RCMP Special Constables who patrol the Shubenacadie reserve appear to have some difficulty in terms of their relations with

many community members. On one hand, they are expected by their superiors to enforce the law in the same manner as any RCMP officer off-reserve. On the other hand, because they are policing their home communities, they are expected by many community members to exercise leniency and to focus on mediation and reconciliation efforts rather than on strict law enforcement. Consequently, there tends to be a general mistrust of the Special Constables on the reserve, which results in non-reporting and significant non-cooperation by community members in investigations. This phenomenon has been observed elsewhere in Canada (Van Dyke and Jamont, 1980) and was confirmed by the majority of individuals interviewed at Shubenacadie, as well as by three people working in social service capacities in the community.

This is the dilemma that often faces people (not just police) working in criminal justice programs aimed specifically at Natives. As Cove points out, "[t]he underlying assumption is that Natives are a 'special problem' within the justice system because of cultural differences" (1988: 3). An obvious solution to this kind of "special problem" from the government's perspective is to place Natives in the roles of state representatives (for example, police), on the assumption (a) that they understand the culture, and (b) that Natives will interact with them more effectively than with non-Natives. However, while the racial origin of the official can change through "indigenization", it is rare that the policies he/she is expected to enforce also change to suit the community context. This is probably more true in the area of justice than in any other area of social programming. In a review of Native policing Depew (1986) has indicated the following:

"Where the police under-emphasize broader, social definitions of their role in the community, many of the policing needs of Native people may remain unsatisfied or simply unknown. Under these conditions, police service delivery is likely to be seriously out of step with the range of substantive policing problems afflicting Native communities. Put another way, the cultural effects of Native contact with the criminal justice system are insufficiently known at the community level. As a result, appreciation of the nature and scope of the Native policing problem has been restricted while the ability of federal authorities to respond to Native problems and needs with the right types of policing arrangements is at least questionable."
(Depew, 1986: vii)

LaPrairie (1988, personal communication) has similarly noted that benefits of indigenization have yet to be demonstrated. Consequently, several Indian communities in Canada, generally

characterized by a high degree of institutional development, have adopted a model of policing that is based on control by the community. The model goes beyond the federal indigenization policy to a significant restructuring of police-community relations along lines specified by the community.

The upshot of these general concerns at the community level is often a police officer who acquires respect neither as a policeman (because he tries to strictly enforce the law according to a non-Native, urban policing model), nor as a community member (because he is not perceived to be upholding the community's best interests).

RCMP Option 3(b) constables are faced with further impediments. They have a "subordinate, adjunct position with the regular policing structure of the RCMP. Organizationally, this is reflected in a shorter period of training, lower pay, the prohibition against Special Constables wearing the traditional red serge of the RCMP, and the fact that Special Constables are ineligible for promotion within the organizational ranks of the RCMP" (Griffiths and Yerbury, 1982: 8). This tends to affect not only the morale of the Special Constables, but also their credibility within the RCMP and, in some cases, in the communities for which they are responsible. The extent to which this applies directly to the 3(b) Constables at Shubenacadie is difficult to estimate. Turnover among Constables has not been a serious problem which may indicate that morale is not suffering.

A variation on the theme of questionable relevance was indicated by several respondents on Shubenacadie reserve and a number of justice system personnel who believe that Special Constables are in a position to show favouritism to friends and family, as well as being susceptible to pressures from political leaders. Some workers in the social services area felt that the Special Constables were not enforcing laws regarding bootlegging on-reserve, even though the bootleggers were well known in the community to be selling liquor to teenagers.

The problems inherent in the RCMP 3(b) program are less significant for the Band Constables at Eskasoni, in large measure because they are more directly under the control of the community as represented by the Chief and Council. While they must fulfill a law enforcement mandate, they also have some flexibility in terms of drawing on indigenous systems of prevention and mediation. Eskasoni police do, however, face certain problems. First, they tend to be insufficiently funded by DIAND (well below the RCMP standard). This leads to inadequate training, especially in the important areas of counselling, mediation and reconciliation techniques, as well as to inadequate equipment, including automobiles. Second, Eskasoni police must continue to rely on the RCMP from Sydney for back-up and for transportation of alleged

offenders to jail in Sydney. By all accounts, these facts affect the community's perception of their constables, as well as their perception by other police forces. In all, the morale and potential effectiveness of the Eskasoni police suffers somewhat.

The question of appropriate roles for police officers on-reserve is difficult. Responses from people in the communities ranged from having non-Native police enforce the letter of the law to the abolition of "White laws" in favour of a model of mediation and reconciliation to be facilitated by a Micmac peace officer. The majority, however, prefer a solution somewhere between the two poles. Generally, they wish to see a review of law enforcement applied to Indians on-reserve. In turn, this could lead to the development of a policing model designed more to meet the common needs of the community, rather than the dictates of the non-Indian legal system. This model would likely involve structures for mediation, reconciliation and restitution. (This view will be taken up in a later section of the report.)

Training and Skills

The question of the roles that should be filled by police officers on reserves directly relates to the kind of training they should receive. The standard law enforcement model of policing requires a certain level of expertise in a number of areas, including the law, arrest and charging procedures, interpersonal relations, administration, and weapons and self-defence tactics. An officer more oriented to the mediation-reconciliation model, on the other hand, requires a different emphasis in his/her training, particularly in the area of interpersonal relations and group dynamics.

Several respondents expressed the view that Native police officers, whether RCMP Special Constables or reserve police, had not received adequate training for the roles they were filling. RCMP Special Constables attend a limited version of regular RCMP officer training in Regina, while reserve police are often restricted due to inadequate funding to sporadic sessions at the Holland College police training centre. Neither program is geared in any way to the special needs of a policeman operating on-reserve, nor is there any emphasis on prevention or mediation.

A number of Crown prosecutors felt that a common weakness among Native police officers is in their administrative skills. This is a natural focus for Crown prosecutors since most of their dealings with police concern administrative matters. People on-reserve, including leaders, social service workers and other residents, often cited interpersonal relations as a weak area for Native police. Interestingly, this response cut across the views held by people on-

reserve about whether police should be strict law enforcers or peace-keepers.

Response Time and Crisis Response Structures

The question of response time is a concern that arose in several interviews with community members and leaders. As might be expected, the problem is not significant in Eskasoni which has its own resident police force. However, the forces responsible for Shubenacadie and Membertou have wider areas to cover and do not respond immediately (if at all) to every call. This is a somewhat paradoxical concern for Membertou since the tendency there is to avoid the police. On the occasions when a call is placed, however, response time has been observed by respondents to be inexplicably long. Similarly, in Shubenacadie, unless one of the three Special Constables happens to be on-reserve and on duty at the time of a call, the response can take up to thirty minutes. While police generally deny there is a problem beyond shortages of police staff and large areas to patrol, two officers remarked separately that police often take their time in responding to calls from reserves because "the trouble has usually blown over by the time we get there anyway."

This view is tied to the perception by police that most of the trouble that occurs on-reserves is the direct result of heavy drinking. Domestic problems, including violence, are perceived by police as temporary situations that will disappear in the morning. Indeed, many Micmac respondents acknowledge that this is the case. The implications here are twofold. First, if the police perception leads to slow or no reaction when a call comes into the station, then public safety is being jeopardized. The assumption that an incident will sort itself out with the arrival of sobriety denies the chance that someone may be in real danger.

Second, the fact that police are the only institutional avenue available to people in immediate danger is a reflection of the lack of crisis services available in Native communities. Cities and towns across the country have rape crisis centres for women and shelters for abused women and their children; yet such facilities exist only rarely in reserve communities and not at all on reserves in Nova Scotia (Clark, 1986b). Similarly, as Depew suggests, when confronted with a situation involving alcohol abuse, police usually have no community-based option for handling the offender, but must arrest and incarcerate him/her.

Racial Stereotyping

Police attitudes regarding calls from reserves and drunkenness, as discussed above, raise the broader question of racial stereotyping. This study was not able to examine the issue in depth but was limited to interviews with several police and respondents in the communities and the justice system. However, a recent national study by the Centre for Criminology at the University of Toronto indicates that a significant degree of racial stereotyping does exist among non-Native police officers with regard to all racial minorities, and further, that this could have an effect on the recognition of individual human rights and on due process.

The implication of the statement cited earlier indicates the existence of racial stereotyping based on an image of Indians as drunk and violent. The violence, however, is perceived to be (a) not serious enough to be of any real danger to individuals, and (b) kept within the reserve community and therefore not as important as violence outside the reserve. This attitude is confirmed by Depew (1986) as problematic in Native policing by non-Natives.

Representatives of the Native Council of Nova Scotia and the Micmac Friendship Centre in Halifax, as well as several Micmacs who have lived in Halifax-Dartmouth, maintain that harassment by police is commonplace. The difficulty in this regard is determining whether the harassment is based solely on racial grounds or, as LaPrairie suggests (personal communication), as well on socio-economic standing. Obviously, either possibility is unacceptable. The question deserves further study in order to arrive at effective solutions.

Summary

What are the substantive needs of Micmac communities that are not being met by existing police forces? Following is a list of needs frequently expressed in interviews by community leaders, community members and on-reserve program workers:

- *police officers who understand the conditions and pressures associated with reserve life;*

- *police officers who actively engage, through formal and informal means, in crime prevention, particularly among young people;*

- *police who understand, encourage and facilitate Micmac processes of mediation and reconciliation, rather than reliance on arrests and charging;*

- *police who are independent of political and family pressures in carrying out their duties;*

- *improved response time;*

- *improved attitudes concerning Natives generally, especially regarding alcohol abuse and its causes and effects;*

- *improved training for police, especially in the areas of group dynamics and personal interaction, including mediation;*

- *adequate funding for reserve police forces to ensure proper equipment, automobiles and office facilities;*

- *on-reserve facilities and concomitant programs designed to assist people in crisis situations.*

The problems with policing in Native communities are based to a large extent on the question of the relevance of the current law enforcement model to the needs of Native communities. Options for policing are examined in Part 5 of the report.

4.2.2 Sentencing

Comparative Sentencing

Due to sampling and information quality problems, the review of files in the Truro and Sydney Crown prosecutors' offices did not indicate any significant variation in sentencing between Natives and non-Natives, or between courts. On the other hand, there was a clear consensus among Crown prosecutors and defence counsel that certain judges are either more or less lenient in sentencing Native offenders. The responses also indicated a consensus as to the identities of the judges. One judge of the Provincial Court confirmed that he tended to impose fines less frequently or fines of smaller size on Natives than on non-Natives, based on his realization that Micmacs living on-reserve were generally poorer than other people in the area. Two other judges were identified by Crown prosecutors and defence counsel as lacking an appreciation of the Micmac socio-economic context and handing down unreasonably harsh sentences. This variation in sentencing as described by interview respondents is consistent with the country-wide disparity in sentencing observed by the Canadian Sentencing Commission (1987), although that Commission did not focus on Native/non-Native sentencing disparity.

Problems Associated with Fines

The imposition of fines can be especially problematic for Native people because, in general terms, their income is substantially less than non-Native income. Low income levels, dependent to a high degree on social welfare, combined with a high ratio of young dependents, results in minimal fines representing a difficult burden for most Micmac families. As Jackson (1987) indicates, the majority of Natives in jail in the Prairie provinces are there because of non-payment of fines. The relative burden on Indian people in this situation is clearly one based on economic disparity.

4.2.3 Probation and Parole

The Relevance of Probation Orders

A concern expressed by a number of probation officers and community social service workers, including alcohol and drug abuse counselors, is that judges occasionally include as part of a probation order a condition that the offender must take a particular type of treatment. This presents difficulties for the offender, who might need an entirely different program of assistance; for the agencies, who must deal with an individual not necessarily suited to their programs; and for the probation officers, who must try to uphold the judge's order despite its possible irrelevance.

It appears, according to interviews, that this occurs more among Natives than it does among non-Natives. Generally, respondents attribute this to a lack of awareness by some judges of the needs of Native offenders and of the programs (though limited) that exist for Natives. Indeed, judges who were interviewed had never visited Mi'kmaw Lodge, the centre for Native alcohol and drug abuse counselling located in Eskasoni, nor did they have a clear idea of the program offered at that or any other treatment facility.

Pre-Sentence and Pre-Disposition Reports

Probation officers often resort to "collateral contacts" when preparing their pre-sentence reports, a technique they rarely use when preparing reports in non-Native communities. (A collateral contact is usually someone from the offender's community who is approachable by probation officers but who does not necessarily have first-hand knowledge of the offender or his/her family. Occasionally, a collateral contact will be someone from outside the community, such as a police officer who has had prior contact with the offender.) This raises the concern that the community is not being

adequately canvassed in connection with the probation of an offender. In fact, the random selection of Crown prosecutors' case files indicated that while the average Native pre-sentence report relied on interviews with between four and five respondents, the average non-Native pre-sentence report was based on interviews with between seven and eight respondents.

The question of an individual respondent's knowledge is also significant in this regard; for example, while the community priest is a relatively easy contact for an interview and therefore is almost always questioned by the probation officer, he does not necessarily know anything about the personal or family life of the offender. This can be especially true on a large reserve like Eskasoni. The vast majority of the Band Chiefs and Councillors interviewed for this study responded that they had never been approached by a probation officer to do a pre-sentence report interview; however, these people would almost invariably know the individual offender or, at least, his/her family.

Another concern with respect to sentencing and probation is that fine options programs (for adult offenders) and the Alternative Measures Program (for young offenders) have not been established on reserves. The danger here lies in the imposition of fines or institutionalization simply because alternatives do not exist in reserve communities. Judges expressed frustration at the lack of structural support for Natives in their own communities. They often have no choice but to give a discharge or impose a fine or jail term.

Parole

Micmacs who are or who have been involved in the criminal justice system feel that parole officers, when writing their community assessment reports, are not able to appreciate the significance of the extended family and the community support that exists on the reserves. They maintain that this is a critical support structure unique to Native communities in its degree of importance that is being denied in their parole assessments. This is often seen as another example of the justice system operating at a distance from the communities, perhaps to the point of irrelevancy.

On the other hand, there are few institutional supports for offenders returning to their communities, a fact that tends to be noticed by parole officers in their assessments. In other words, without institutional support structures in the parolee's community, his/her chances of a favourable recommendation are less than for a non-Native returning to his/her community (all other things being equal). One parole officer indicated that more formal supports are required in the communities, perhaps beginning with trained people assigned to assisting parolees reintegrate in the community. While

social community workers are presently of some help in this regard, they are generally too overburdened to spend enough time with parolees. The same officer also noted that while the Native Brotherhoods and Alcoholics Anonymous provide essential support in the prisons, these programs are not available for continued support when the offender returns home.

Another concern for Micmacs is the existence of the parole service criterion relating to "prospects for employment". Parole officers in their community assessment reports are required to assess this factor in making their recommendation. One responding parole officer suggested that this criterion was "not a prime requisite" but an important factor nonetheless, especially in cases involving individuals who had a history of alcohol related problems. From the aboriginal perspective, of course, this criterion is discriminatory since, as was indicated earlier in this report, Micmac communities have chronic unemployment rates of over 50 percent. The question "prospects for employment" is thus automatically loaded against the Micmacs' interests.

Similarly, lower education levels in reserve communities decrease the chances of individuals finding work even off their reserves; again, this is an example of systemic discrimination since the Parole Service makes decisions based, in part at least, on this factor.

4.2.4 Aftercare

Aftercare programs designed to meet the needs of Micmac individuals and communities are non-existent except for the overburdened and underfunded Micmac Friendship Centre in Halifax. The Friendship Centre runs a halfway house program for Native offenders that is almost always filled to capacity. However, staff suggest that while there is considerable movement in and out of Halifax from the reserves as young people seek employment, the city is not a good place for Micmacs to live. A continuing lack of job opportunities and the emphasis on their relative poverty and lower educational attainments often leads to greater feelings of frustration and depression for young Micmacs in Halifax. Of course, this includes offenders recently released from prison. They, perhaps more than most Micmacs, need the support of their families and friends in familiar surroundings. The message from both offenders and Friendship Centre staff is that there should be a formal support structure established in the reserve communities to complement the communities' inherent support systems.

With the exception of the Micmac Friendship Centre in Halifax, rehabilitation programs and halfway houses located in non-Indian towns and cities have proved to be ineffective in helping Indians.

This is of particular concern in light of the increasing numbers of young people entering the correctional institutions. Again, Micmac communities have no contact with and no stake in a component of the justice system that, perhaps more than any other, requires the involvement of family and friends in familiar surroundings.

4.3 Structural Factors: Access to Justice

4.3.1 Legal Representation

Access to Counsel

Access to legal counsel does not appear to be a problem in Nova Scotia. Legal aid lawyers are available, if often overworked, and awareness of the service by Native people is high. Judges generally refer individuals to legal aid counsel if counsel has not already been retained for plea entry. Very rarely would a judge in Provincial Court consider allowing a Native person, especially a young person or a first offender, to go to trial without counsel.

A difficulty, as in other parts of the country, is that people (Native and non-Native) often wait until the last minute prior to a hearing or a trial to approach a legal aid lawyer. As a result, counsel's already limited time is rendered even more ineffective, particularly if the case is complex or if a communication problem exists between counsel and accused.

Communication

Difficulties sometimes arise for Natives and their lawyers in terms of conceptualizing the issues surrounding a case. This can also be a problem for Native accused when dealing with judges, police and Crown prosecutors. Several lawyers advised the researcher that they have to be careful to establish if an Indian person is guilty or not because a criminal record and, particularly, probation are of little consequence to many Native people. As other studies have indicated (Clark, 1986a), Natives in various parts of the country are not deterred by the prospect of a criminal record since they foresee no chance of employment that could be jeopardized. The main concern for many Native accused, especially young people and first offenders, is to get away from the unfamiliar and disconcerting courthouse - to "plead guilty to get it over with". The same reaction was observed among Natives in New Brunswick (Clark, 1987). (Other concerns regarding communication are described in a section following on Hearings and Trials.)

Concerns Regarding Plea Bargaining

In contrast to the attitude described above, many Micmacs complained that legal aid lawyers did not take their defences far enough. The majority of Micmac respondents who were relatively "experienced" in court proceedings (i.e., not young people or first offenders) and familiar with legal aid representation expressed serious concerns regarding plea bargaining. First, these respondents see plea bargaining as a way for their lawyer to avoid making a case on behalf of the accused. In other words, "the lawyer was not doing his job" if he did not take every case to trial. Second, people perceive that plea bargaining goes on among the defence counsel, the Crown prosecutor, the police officer and the judge without the involvement of the accused.

This contributes to the belief already held by many Micmacs that all justice system personnel, including defence counsel, are in league against the people being served. Often this is further perceived as discrimination against Indians.

Lawyers, on the other hand, see plea bargaining as an efficient and acceptable way to get the most sensible decision for the accused. Lawyers maintain that they never enter into plea bargaining without first explaining the process and the possibilities to their clients, and then getting the client's instructions as to how to proceed. This is an issue between Native respondents and lawyers that research was not able to clarify. The point that should be noted, perhaps, is that a difference of opinion does exist. While it may be that lawyers are explaining the situation to the accused, they may not be doing a good job of it, thus leaving their clients confused. It may be the process of communication between counsel and client that should be addressed.

The unfortunate result of this problem is that, while Native people are forced through lack of money to resort to legal aid, they generally have a poor opinion of the quality of counsel supplied by legal aid lawyers. This, in turn, often makes the working relationship between Native accused and legal aid lawyers strained from the beginning.

Additionally, it was suggested by several lawyers, including legal aid and private counsel, as well as Crown prosecutors, that the legal aid system in Nova Scotia is overburdened. This makes it difficult for lawyers to take as much time with their clients as required, particularly in the case of Natives when there are language and perceptual differences. Inadequate salaries for legal aid lawyers was cited by essentially the same respondents as contributing to a high turnover rate, resulting in a high proportion of legal aid lawyers fresh from law school. This tends to work against Micmac interests since lawyers' appreciation of Indian conditions and Indian law generally derives from experience rather than from law school.

4.3.2 Hearings and Trials

Conceptualization and Language

It should be noted that most Native accused, victims and witnesses find the court process to be intimidating and, to a great extent, incomprehensible. (Refer to the testimony of Bernie Francis before the Royal Commission.) This may be due in part to a conceptualization process that can differ between Natives and justice system personnel.

The fact that many Natives plead guilty "to get it over with" because they are intimidated by the court has a bearing on the involvement of the accused in his/her own defence. Judges and lawyers often express concern that Micmacs do not speak more vociferously in their own defence or in the defence of their family members and friends. Language can be a contributing factor, particularly for elderly people from reserves where English is still the second language. It was suggested by both a defence lawyer and a Crown prosecutor that certain Provincial Court judges have been known to become exasperated with a Native accused or witness when that individual did not respond clearly on the stand. The problem is generally acknowledged to be one of language comprehension and feelings of intimidation. The problem can apparently be overcome with patience, however, as respondents unanimously cited Judge Robert McCleave, formerly at the Provincial Court in Shubenacadie, as being able to help people through the process.

Defence lawyers often find that they must be careful in their questioning of a client. This again is a problem borne of language differences and different conceptualizations of matters that are raised in court. It should be noted that there was agreement among Micmac respondents and justice system personnel that such difficulties tended to arise more often in cases involving residents of the more isolated reserves, such as Eskasoni and Wycocomagh, where Micmac is still the first language. An example will serve to explain the point. In a recent case involving an Eskasoni man, the Crown prosecutor asked the accused if he had been in contact with the RCMP after the incident. The response was negative; yet a statement had been signed by the accused the day after the incident. In discussion with the accused after the trial, his defence counsel learned that to the accused, "after" meant "*immediately* after".

Similarly, Bernie Francis testified at the Royal Commission hearings that many Micmacs translated the judge's question, "How do you plead: guilty or not guilty?" as "Are you being blamed?" Heard in this way, the natural response is to answer in the affirmative, which can then be interpreted by the Court to mean

"guilty". As Scollon and Scollon (1981) point out, this kind of linguistic reconceptualization is not an uncommon problem for Native people and the courts in North America. The extent to which the specific example provided by Bernie Francis holds in Nova Scotia courts is difficult to estimate; it can safely be said, however, that older Micmacs and people from the more isolated communities experience similar communication problems regularly.

Another common problem is one of individuals contradicting their own testimony on the stand. While this may be thought of as a prosecutor's delight, it is generally acknowledged to present difficulties for all concerned. In a state of nervousness brought on by unfamiliarity, feelings of intimidation and an inability to communicate effectively in the court's language, individuals on the stand will sometimes respond to questioning by providing answers they believe the questioner wants to hear. This was confirmed by Native social service workers who often sit in court, as well as by defence counsel and Crown prosecutors.

In summary, there are frequent problems for Micmacs and for justice system personnel arising from a lack of familiarity stemming from both cultures. Indian people are often intimidated by the court, in part through language barriers and a lack of understanding of the process, and in part from a sense that the system is stacked against them. The latter outlook is the inevitable result of a history of frustration in dealing with non-Native society, whether in criminal justice or in any other matter. On the other side, judges and lawyers are often at a loss as to how to help people overcome their difficulties, or how to deal with the problems as they arise in court.

Juries

There has not yet been a jury trial in Nova Scotia in which a single Native person has sat on the jury. It appears that Natives' names simply do not arise as candidates. The reason for this is unclear; suffice it to say, however, that Natives' names should arise for selection if a random sampling procedure is being applied as it should be.

Clearly, this represents a contradiction of the principle of trial by one's peers, if it is accepted that there are significant social, economic, cultural and political differences between Micmacs and Euro-Canadian societies.

The benefits to Native representation on juries are several. First, there would be increased assurance that the accused would receive a fair hearing, untainted by racial prejudice. Second, the case of the accused would be heard by at least one jury member who had an understanding of the context of the alleged incident, the dynamics involved (particularly if the offence occurred on a reserve), and the

possible motive of the accused. Similarly, at least one jury member would have an understanding of the support system (or lack thereof) waiting for the accused as an alternative to incarceration. Third, Native involvement on juries would contribute to an increased understanding of the justice process by Natives and of Native conditions and concerns by other jury members and justice system personnel.

Native and justice system respondents offer varying opinions as to the best way to involve Natives in the composition of juries. Some Natives suggest that in the interests of a fair hearing and in respect of aboriginal rights, Native accused should be judged by a jury comprising Natives only. At the other end of the scale, some respondents recommend only one Native jury member in trials of a Native accused in order to maintain a proximity to the make-up of the general population. Still others recommend that Natives be selected for candidacy only on a random basis (in trials of Native or non-Native accused) and that no mandatory Native involvement be legislated.

The answer to the question of representation will depend to a certain extent on other issues to be decided in the process of addressing Native justice issues; e.g., the nature and structure of courts in which Natives are tried. These issues will be dealt with in Part 5 of the report.

4.3.3 Access to Justice: General Concerns

The relevance of the judicial process is a general issue raised frequently by Micmac leaders and others. Because the courts are often some distance from reserves (e.g., Eskasoni), it is often difficult for people to attend court as accused, witnesses or observers. The court, which is already an unfamiliar and somewhat intimidating institution, is physically and conceptually removed from the indigenous processes of social control based on mediation and restitution. Community justice processes are ignored as non-Natives dispense their form of justice in Native communities. Restitution in the form of fines is made to the state, not to the offender's community or to the individual victim. In summary, Micmacs believe that they have no stake in the court process.

4.4 Indigenous Justice

4.4.1 Introduction

Community-based mechanisms of decision-making and social control are often referred to in the literature dealing with aboriginal criminal justice issues. Yet those processes are rarely described and analyzed with a view to their effectiveness or their fit with the wider justice system. The task is important for three reasons. First, if effective, community-based justice processes could be given their due recognition and instituted as a legitimate and complementary component of the wider system. Second, if encouraged and supported, effective indigenous justice mechanisms such as mediation and reconciliation could be adapted and instituted in other community settings, Native and non-Native. Finally, in the spirit of recognition of aboriginal rights to self-determination and the need to take innovative steps to deal with the abysmal social conditions facing aboriginal people, it is time to accept the claim by aboriginal leaders that there is a way to proceed based on indigenous processes of social control. In some cases those processes have been stifled by outside pressures, but they remain largely intact and ready to be applied when recognized and supported.

The research for this report did not include a close look at indigenous justice processes on a community-by-community basis, as needs to be done. However, in the process of interviewing community members, including leaders, there were indications that indigenous social control mechanisms are intact. The following section briefly discusses those observations, as well as initial indications of community aspirations in terms of indigenous justice. Part 5 of the report examines the possibilities further.

4.4.2 Preliminary Observations

Studies in aboriginal communities in other parts of Canada demonstrate that the roles played by the extended family and the community's elders are often important in social control and judicial decision-making, respectively. Systems of customary law tend to be non-adversarial, based on processes of mediation, arbitration and reconciliation. Initial indications based on limited discussions suggest the same pattern in Micmac communities.

Extended Family and Elders

The extended family acts as a network of mutual support. Children generally feel as comfortable in the homes of their grandparents and aunts and uncles as they do in their parents' homes. Extended family members typically have the same degree of responsibility as parents

for protecting and educating the child and instilling in him/her acceptable values. This is particularly important in cases of hardship which, in earlier days, might have been manifested in economic or health problems for the parents. Contemporary social problems related to alcohol and incarceration often require extended family members to take active responsibility for raising children on reserves.

Child welfare agencies operated by provincial governments have historically ignored the extended family support system. Supported by law enforcement agencies, children in reserve communities identified by non-Native social workers as living in unacceptable home settings were apprehended and taken from their communities. In many cases these children were adopted by non-Native families and restricted from their own communities. Fortunately, this pattern has changed with the development of community-based child and family service agencies staffed by trained Native social workers. The extended family has again been allowed to operate as a support network for children.

The extended family holds potential for supporting offenders on probation or parole. It was indicated by community leaders, social workers and several respondents in the justice system that extended family members should be given recognition as having a role to play in terms of community-based support for offenders. In the immediate term, pre-sentence reports and pre-disposition reports prepared by probation officers and community assessment reports prepared by parole officers would reflect this factor after assessing its potential on a case-by-case basis. In the longer term, more comprehensive community-based justice systems would naturally build on indigenous structures such as the extended family.

Elders are regularly consulted by Micmac leaders and other community members. Generally, their role involves advice in decision-making, mediation between conflicting parties, and counselling young people. Elders have the potential to be involved formally in a counselling and monitoring capacity with probationers and parolees, as well as in crime prevention programs designed for school age children.

The roles of the extended family and elders remain intact but diminished in many aboriginal communities because of the extent and severity of social problems in recent years and because of overt attempts by non-aboriginal agencies to weaken or bypass them. The same is probably true in Micmac communities. Realization of their potential will require definition and recognition of their roles.

Mediation and Reconciliation

Customary legal processes are often claimed to be based on non-adversarial principles manifested in prevention, mediation and reconciliation. In various communities in Canada studies have confirmed that this is the case, with variations according to historical and cultural factors. Preliminary discussions on the topic indicate that the same is true in Micmac society, although, like the roles of the extended family and elders, the strength of customary legal processes have been diminished as the result of impositions from non-aboriginal society.

4.4.3 Indigenous Justice: Summary Notes

The leaders of aboriginal communities argue that the implementation of community-based justice processes is essential in the development and recognition of aboriginal self-government. Many leaders also say that the processes must involve indigenous justice processes. In order for that to be accomplished, Micmac leaders recognize that indigenous justice will have to be examined closely to determine the most effective means of building it into new governing systems and coordinating it with non-aboriginal structures. In this regard, the support and cooperation of other governments will be essential.

4.5 Mi'kmaq and the Criminal Justice System: Summary

Systemic factors in Nova Scotia's criminal justice system lead to adverse effects for aboriginal people *because they live in or come from aboriginal communities*. Policing that has been designed specifically for aboriginal communities is relatively ineffective. Justice processing, including legal representation and courts, are often at considerable distance from Native people both physically and conceptually. By the same token, a lack of understanding by many justice system personnel of Micmac social and economic conditions and aspirations leads to differential and often inappropriate treatment. Probation and parole services apply criteria that have built-in biases against Natives by failing to allow for their unique social and economic conditions. Indigenous processes are officially by-passed, if not consciously weakened.

There is variation among communities and between on-reserve and off-reserve residents as to the nature and extent of the adverse effects people endure. For this reason, and consistent with individual community moves towards self-government, it is important that the problems and their solutions be addressed on a community-by-community basis. The following part of the report considers some ways in which this can be done.

Part 5
Responses to Problems

5.1
Introduction

In recent years the efforts by aboriginal groups in Canada to uphold and operationalize their rights to self-determination have accelerated dramatically. The failure of the constitutional negotiation process has not deterred Native people; they now pursue their goals by various means, ranging from negotiations with other government officials on a program-by-program basis to legal suits under sections 25 and 35 of the *Canadian Charter of Rights and Freedoms*.

The process of justice has become an essential component in Native plans to exercise self-determination. This is for three main reasons. First, Native people and their leaders feel that they are not well served by the existing justice system, including policing, the courts, and the sentencing process. Second, they see the system as removed from their communities (physically and conceptually), and largely irrelevant to the values, needs and processes of social interaction operating in their communities. Third, they recognize that without activating appropriate justice processes free from outside interference, attempts at self-determination are meaningless.

The challenge for Native groups, including the Micmac, is to define "appropriate justice processes" to suit the needs of their communities. A further challenge exists for the same aboriginal groups and for federal and provincial governments to reach agreement on new structural relations that will enable changes to be made and to continue working. Until now, as LaPrairie has pointed out, "[t]he dominant theme of the conflict between Native people and the criminal justice system has been culturally based, which has meant that 'culture' becomes the primary factor in examining the potential for discrimination in criminal justice processing" (LaPrairie, personal communication). This has led to policies and programs of "indigenization" such as the RCMP Special Constables program which, as described earlier, are questionable in their effectiveness.

LaPrairie goes on to say the following:

"...what is seen in many of the adjustments to the criminal justice system by way of 'indigenization' or other culturally-based strategies, is a 'cultural response to structural problems'. Dealing with the problem of structure should be one of trying to reduce some of the effects of structural disparities within the context of criminal justice processing. The other approach to diluting the impact of the marginal status of Native people, thereby reducing the number of people involved as offenders in the criminal justice system, is to promote socio-economic betterment among this group. This is, of course, a much more difficult task, focussing attention as it does on fundamental disparities in society. What it raises for the criminal

justice system is its ability to accommodate social and economic differences in such a way as to redress the imbalances in its functioning, imbalances which are created by socio-economic inequality." (LaPrairie, personal communication)

The Australian Law Reform Commission draws similar conclusions in its examination of the over-representation of aborigines in the Australian correctional institutions, a phenomenon that also exists in Canada:

"The disproportionate representation of Aborigines at all levels of the Australian justice system will not be avoided by providing greater discretions or setting up new rules for judges and magistrates in sentencing Aboriginal offenders. The primary reasons for this disproportionate representation lie outside the criminal justice system, but this is not to say that improvements cannot be made. Some limited impact can be made if action is taken at all levels (the police, the courts and the prisons)." (Australia. Law Reform Commission, 1986: 392)

That Commission, like LaPrairie, is suggesting that the primary causes underlying problems for Natives in the justice system are related to social and economic conditions, not to the justice system per se. Jackson, in a report of the Special Committee of the Canadian Bar Association on Imprisonment, goes farther: "Poverty itself is a product of a historical process which has affected Native communities and we suggest that the real solutions lie in the reversal of that process" (1987: 6). The connection between chronic poverty, on one hand, and individual despair, alcoholism, family breakdown, and crime, on the other hand, is well documented. Certainly, we can expect this to be the case in Micmac communities, given the history of deprivation described earlier in the report. However, LaPrairie (1986) also points out, studies in the United States have indicated that people who are poor and/or Black tend to attract the attention of the criminal justice system, particularly the police. Preliminary results from the Charter of Rights project undertaken by members of the Centre of Criminology at the University of Toronto appear to confirm that police tend to be biased in such a way as to make the same phenomenon likely for Canadian Natives.

In summary, the most effective approaches to the problems are, first, to make structural changes without resorting to indigenization based on ill-defined notions of "culture", and second, to improve socio-economic conditions in Native communities. As suggested above, the challenge is before both aboriginal governments and

federal and provincial governments to design and effect the required changes.

There have been several initiatives in the area of criminal justice by aboriginal groups, especially in Canada. While the initiatives have achieved varying degrees of success, it is important to recognize that few program developments are likely to apply universally to aboriginal communities. Each community, or group of communities, at least, has its own set of social and economic conditions for which it must account and its own set of social control mechanisms which it will want to accommodate.

A further word of caution is in order. We must recognize that Native communities have had to change their customary ways over the years as external pressures have come to bear. And, as LaPrairie says:

"The desire to hold on to notions of what appears to have been a more just, egalitarian, cohesive and less adversarial society is compelling, but the existence and maintenance of customary law in Aboriginal society in Canada today must be examined in the contemporary context. Customs evolve from social relations, and it would be unrealistic to expect that rules and mores would be the same today (except perhaps in the more isolated and culturally intact communities) as they were in pre-contact times. The challenge, it seems to me, is to determine the way in which these rules and mores have been adapted to reflect changing social and economic relations and how these adaptations of customary law function in contemporary Aboriginal society." (LaPrairie, 1986)

Few, if any, aboriginal organizations are suggesting that a full return to customary ways is feasible. Instead, they recognize the need to adopt contemporary strategies that ultimately will best serve the needs of their communities. These strategies may or may not contain elements of customary social organization; however, if they do, it must first be demonstrated that those particular elements are not out of place in the community's present context.

As well, we should bear in mind that any new developments designed to address the problems experienced by Natives in the criminal justice system will have to mesh with the wider, non-Native social-judicial system. Micmac communities, like all communities in Canada, are to some extent bound up with the wider system. To deny this fact would be to invite real problems for the community in question, both in terms of instituting new programs and in achieving lasting success through those programs. Cooperation among governments will be essential.

In that light, there are certain outstanding issues that must be resolved:

- *The implementation of an effective constitutional process enabling self-government for aboriginal nations - in order that community governments can plan, coordinate and control policies and programs aimed at their people;*

- *The recognition of other aboriginal rights referred to in the* Canadian Charter of Rights and Freedoms - *in order that aboriginal people can again derive economic and cultural strength from their land and resources;*

- *The recognition by the Province of Nova Scotia of Micmac treaty rights - in order that the Micmac can exercise their territorial rights to their land base.*

Further, a prerequisite to the development and implementation of any innovations is the concerted effort by federal and provincial governments to work with aboriginal communities to overcome the intolerable cycle of poverty that exists there. In part, this will be achieved when Nova Scotia recognizes Micmac rights to land and resources according to the Treaty of 1752 (see below). Referring again to Michael Jackson's report, until the cycle of deepening poverty is broken there will continue to be community-destroying crime, comparatively high rates of incarceration, and racial stereotyping directed against Indians. The underlying answer to dealing with problems of Natives in the criminal justice system is to negate the obvious reasons for their involvement. It will then become easier for any new structures to administer justice.

5.2 The Treaties and the *Simon* Case

The Micmac maintain that formal treaties signed by themselves and the British properly form the basis of all relations between the Micmac and the Crown in right of Canada and Nova Scotia. This premise continues to have significant implications for the Micmac legal position as evidenced in 1985 by *James Matthews Simon* v. *The Queen* [1985] 2 S.C.R. 387.

The first formal treaty of peace and friendship was signed in 1725 and ratified by the "Nova Scotia Tribes" in 1726. In it "the fishing, hunting and fowling" activities of the indigenous nations were explicitly recognized. Together with their land rights, these were to be protected in exchange for a commitment to cease hostilities, accept existing British settlements, and return any British prisoners they might have. Any future disputes were to be dealt with according

to British law and in court where indigenous persons were to have the same privileges as British subjects" (Native Communications Society of Nova Scotia, 1987: 4).

The subsequent Treaty of 1752 reaffirmed peace and friendship between the Micmac and the British, and again referred explicitly to "Free Liberty of hunting and fishing as usual" for the Micmac. The Treaty again accorded the same privileges in court to the Micmac as to any British subject. The Royal Proclamation of 1763 recognized the right of Indians throughout British North America to their free use of the lands which had not been purchased from or surrendered by them. While aboriginal rights to land and resources were affirmed for all Indians in the Royal Proclamation, and for the Micmac specifically in the Treaties of 1725 and 1752, the process of erosion of those rights began as waves of new settlers came to British North America in the late 1700's. Today we witness the legacy of the erosion of aboriginal rights in land claims and court cases initiated by aboriginal groups across the country.

The *Simon* case is a landmark in the efforts of the Micmac to achieve recognition of and adherence to their treaty rights. Mr. Simon, a Micmac from Shubenacadie Reserve, was found to be on a public road in closed season in possession of a shotgun and shells of a type not permitted by the provincial *Lands and Forests Act*. His defence was based on the applicability of the Treaty of 1752. Among other responses, the Nova Scotia Attorney General argued that any treaties that may have existed in Nova Scotia had been "superseded by law" (Native Communications Society of Nova Scotia, *ibid.*, p. 11).

As the process carried on, "Mr. Simon was convicted by the Nova Scotia Provincial Court. His appeal of the conviction was dismissed by the Nova Scotia Supreme Court, Appeal Division. Ultimately, he sought and was granted leave to appeal to the Supreme Court of Canada. The decision of the Supreme Court of Canada was rendered 21 November, 1985" (Native Communications Society of Nova Scotia, *ibid.*, p. ll). The Court held that the Treaty of 1752 was a valid and enforceable treaty, overriding the provincial *Lands and Forests Act*. Mr. Simon was subsequently acquitted. While the Supreme Court decision in *Simon* is subject to interpretation, the Micmac see it as an affirmation of the validity of the Treaty and of their hunting rights, at least on-reserve.

The case is cited here because on a higher plane it can be said to represent the Micmacs' first major assertion in some time to their autonomous rights within Nova Scotia. As challenges under the *Canadian Charter of Rights and Freedoms* (particularly Section 35 pertaining to aboriginal rights) become more common in Canada, we might expect the Micmac to carry their case further. In part, this is

likely to lead to moves toward greater aboriginal control of local Indian governments, from the current administrative authority exercised by Band Chiefs and Councils to legislative authority. Aboriginal governments in other parts of Canada can be cited as indicating possible future directions for the Micmac. Examples include the Gitksan and Wet'suwet'en in British Columbia, the Saddle Lake Band in Alberta, and the Dakota-Ojibway on the Prairies. If Micmac governments adopt the same priorities, we can expect to see the control of community-based justice high on the list of goals.

5.3 Potential Responses

5.3.1 Community-Based Justice

The development of community-based justice systems covers a wide range of possibilities. At one end of the spectrum is the possibility for new, individual programs (e.g., Alternative Measures for young offenders) under the management control of local authorities. At the other end of the spectrum is the recommendation for a comprehensive aboriginal justice system incorporating tribal courts with the mandate to uphold treaty and aboriginal rights and to apply customary Micmac law. (With respect to the latter option, see Appendix 2: a submission prepared by Dr. Marie Battiste on behalf of the Grand Council of the Mikmaw Nation.) Significantly, very little will be accomplished, particularly in terms of any recommendations for higher levels of Micmac authority and control, unless there is resolution of outstanding treaty and constitutional issues.

The rate of developments leading to a Micmac justice system would be determined by a number of factors:

- *the will and abilities of Micmac people and their leaders to move in this direction;*
- *the political will of the federal and provincial governments to resolve outstanding issues and to support the development of an aboriginal justice system;*
- *the will of the people of Nova Scotia to support such a development;*
- *the identification (and, if necessary, the institution) of a body to do the required developmental work;*
- *the establishment of a tripartite forum (Micmac/federal/provincial) for the discussion and negotiation of a Micmac justice system.*

5.3.2 Community-Based Courts

During this study Micmac leaders and several justice system personnel recommended the immediate step of establishing the presence of Provincial Court in reserve communities. The aim would be to bridge both the physical and the conceptual distance between Micmac communities and the Courts. In this light, even Membertou, which is close to the court in Sydney, would benefit from this development.

Micmac leaders generally feel that positive results would arise from the presence of Provincial Courts in reserve communities:

- Native accused would be more likely to show up for court appearances because (a) distance would no longer be a problem, and (b) community members would naturally monitor court appearances of others more closely than at present, thus ensuring improved court attendance;

- community members would feel that they were more a part of and had a greater stake in the justice system if they could see it operating in their communities;

- a system of consultation could be established between the court and community representatives with a view to assisting the Court in its administration and deliberations;

- justice system personnel would gain a greater understanding of Micmac conditions and concerns;

- Micmacs would gain a greater understanding of the justice system;

- Micmac feelings of intimidation in court would be decreased.

5.3.3 Tribal Courts

Recent comparative work on tribal courts (Stevens, 1988) indicates a range of possibilities internationally but none that would perfectly fit aboriginal needs in Canada. Tribal Courts in the United States, Australia and Papua-New Guinea show considerable variation, in terms of their autonomy, from the western court system, the degree to which they apply customary laws, the selection of their jurists, their resources, their organization, and their effectiveness.

Jackson (1987) writes that the Australian Law Reform Commission examined a number of tribal court systems internationally (though not the Saddle Lake model described below).

The Commission noted the variation in orientation of the models which ranged from indigenized systems which merely replaced non-Native personnel with Natives (primarily in the U.S.) to systems such as one in Papua-New Guinea which was based on local customary law. (The Commission's preference was for the latter type.)

A Canadian example - Saddle Lake in Alberta - provides perhaps the most relevant model of a tribal court system to the social realities and needs of aboriginal communities in this country. The Saddle Lake Tribal Justice Centre has worked for several years to design a culturally appropriate justice system that would handle all aspects of conflict resolution on a community controlled basis by applying customary law (Saddle Lake Tribal Justice Centre, 1985). All adversarial processes were replaced in the model by mechanisms of conciliation, mediation, arbitration and restitution. Peacekeepers, rather than police, were built into the model as the front line mediators, to be backed up by a Council of Reconciliation comprising community elders.

Saddle Lake has had some difficulty in operationalizing its model. In part, the problem stems from a failure to come to agreement with the Province of Alberta regarding the plan's implementation. As well, however, there appears now to be some skepticism within the community itself about the validity of the plan. Concerns may stem from two related issues identified by the Australian Law Reform Commission in its examination of community-based courts applying customary law: (a) whether community members should have the right to opt out of their court system in favour of the standard courts, and (b) whether there should be an appeal process involving the standard courts.

These are difficult issues for communities to resolve, the more so in Canada since we have a new Charter to protect individual rights - rights which could be claimed to be denied in a justice system without recourse to a second or third level of court.

The methods of establishing tribal courts in Canada will determine their nature to some extent, as indicated by Stevens (1988: 34-40). The first approach would be to establish a separate court system based on "residual sovereign authority" and under the umbrella of aboriginal right to self-government. Stevens points out that while the courts (particularly the Supreme Court of Canada) appear relatively favourable these days, establishing a separate court would be a bold move.

Stevens then goes on to outline a second approach:

"A band council could pass a by-law to administer justice and administer a tribal court system. This could be done by relying on, in particular, Section 81 (c), (d), (p), (q) and (r) of the Indian Act.

Section 83(1)(b) and (c) could also be used to justify the appointment of individuals as judges and for the payment of their salaries. Section 83, however, could only be used if the Governor in Council had already declared that the band had reached an 'advanced stage' of development." (Stevens, 1988: 34-35)

Problems with this approach are that the Minister of Indian Affairs and Northern Development retains the right to reject by-laws passed by band councils, and that the powers specified under Section 81 are quite limited. Thus, the autonomy associated with this option is negligible.

A third approach described by Stevens is based on Section 107 of the *Indian Act*. Section 107 allows band councils to name an individual as a Justice of the Peace, the appointment to be made by the Governor in Council. The J. P. would have authority to hear offences under the *Indian Act*, a limited number of *Criminal Code* offences, and breaches of band by-laws. Again the problem is one of limited autonomy and jurisdiction.

Steven's fourth approach is based on Parliament amending the *Indian Act* or creating a new act to deal with the issue. Either move would be under the authority of Section 91(24) of the *Constitution Act, 1867*. While Stevens does not raise the point, it is worth noting that the self-government development process of the Department of Indian Affairs and Northern Development was established ostensibly to negotiate legislative modifications and creations. However, the Department appears to be having difficulty defining the possibilities under Section 91(24) - this could be a slow process.

Finally, Stevens identified Parliament's authority to establish courts under Section 101 of the *Constitution Act, 1867*. Section 101 reads as follows:

"The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

Stevens says, "The last two approaches [Section 91(24) and Section 101] would offer the greatest security. It would also allow expansion of the jurisdiction of the court into enlarged criminal jurisdiction, family law and civil law jurisdiction" (*op. cit.*: 39).

He then goes on to point out some issues that must be considered by all parties when approaching the task of establishing a tribal court. I will quote Stevens at length:

"There are a number of jurisdictional issues which will concern both aboriginal governments and federal and provincial governments. The question of what kind of jurisdiction the Tribal Court will exercise will for the most part be determined by the way that this Court is established.

There is the question of what kind of matter the Court could deal with. For example under Section 107 of the Indian Act *the jurisdiction of the Court would be limited to minor criminal offences but if a Court were established pursuant to s.101 there could be unlimited jurisdiction over criminal and civil matters. Generally speaking, aboriginal governments want to take over jurisdiction in some criminal offences; some civil matters; family law matters; and band government matters. [True for the Micmac.] Secondly, in respect to territorial jurisdiction, the Court would have jurisdiction within its reserve boundary. There is still a question of where the reserve boundary is if the reserve is adjacent to a lake or a river. Also there is the issue of whether the Court will have jurisdiction over 'surrendered land'. The aboriginal position is that the territorial boundary applies to the middle of the body of water and that it has jurisdiction over surrendered land.*

The next jurisdictional issue is what person the Court will have authority over. Should it be all people *within the boundaries of the reserve, only* aboriginal people *within the reserve boundary or over* all persons, *but it must be in* respect *to a suit or offence* which happened within the reserve boundary. *It would seem that the Court should have jurisdiction over all persons so long as it concerns something which happened within the reserve boundaries."* (*op. cit.*, pp. 39-40)

Stevens goes on to point out other issues:

"There is a real question as to whether some bands would have the resources and expertise to implement a distinct Court system of their own. This is a normal concern but one which may be overcome by small bands cooperating with neighbouring bands to pool their resources. Such a larger unit would then coordinate the Administration of Justice by ensuring that there was adequately trained personnel, facilities, financing, fulfilling an advisory function, etc.

Another issue which concerns governments is whether the established Court system will exercise an appellate function. The presence of an appeal court would help to allay any fears of

inexperience or the possible unfairness or absence of rules of natural justice. More than likely the Canadian courts would exercise this appellate function unless there was an agreement to the contrary. Finally, there is the question of how the Canadian courts and the aboriginal courts will inter-relate. Will each enforce the decisions of the other court? Will each court respect the exclusive jurisdiction over certain cases or will the person have a right to be heard by an established court? These are questions which must be answered prior to these courts being established."

5.3.4 Native Policing

There are a number of Native policing programs currently operating:

- the RCMP Special Constable program;
- the Ontario Provincial Police Native Constable program;
- the Dakota-Ojibway Tribal Council police;
- the Amerindien Police in Quebec;
- the Kahnawake Mohawk Peacekeepers on the Kahnawake reserve in Quebec;
- the Akwesasne Police on the Akwesasne reserve near Cornwall;
- the Louis Bull Band Police in Alberta;
- the Eskasoni Reserve Police.

There is considerable variation among these forces in terms of their orientation to strict enforcement of federal and provincial laws vis-à-vis their orientation to prevention, mediation and dispute resolution according to community standards. Generally speaking, the Kahnawake Police are acknowledged to be the most progressive in terms of upholding community standards through customary Mohawk approaches to problems, while also enforcing the *Criminal Code* and provincial laws. The Kahnawake Police see themselves and are generally seen by their community as *peacekeepers* rather than as enforcers. Kahnawake also has a group of conservation officers who work closely with the police.

One key to the success of the Kahnawake force has been the development and maintenance of high standards of training and equipment. The program has been operating long enough that training is now done in-house. Another key has been the involvement of community members from the planning stages of the force to its ongoing operation.

Other factors also make the Kahnawake force unique. Depew (1986: 68) outlines these factors:

"The local Band Council has not acknowledged that the Quebec Government has any jurisdiction on the reserve in policing and other matters. The Kaknawake police are sworn by a Justice of the Peace under the Indian Act, *while a court decision has determined that the reserve police are peace officers, as defined in Section 2 of the* Criminal Code. *Consequently, the Kaknawake police have full peace officer status and may enforce federal statutes, including the* Criminal Code, *and band by-laws on the Kahnawake reserve. Currently, the police department comprises a chief, 11 peace-keepers and four administrative staff who report to a Police Committee established by the Band Council. Funding arrangements are the responsibility of the federal Department of Indian and Northern Affairs [though there have been funding problems in the last couple of years]."*

In the urban setting, the Vancouver Native Liaison Police Program was recently established. The program assigns specially selected and trained officers to parts of the city heavily populated by Natives, with the aim of prevention and dealing with problems first using a mediative approach. Initial indications are that the program is effective. The applicability to Nova Scotia of a program of similar scale is questionable since the aboriginal population in Halifax is relatively small (300-400 people) and not centred in any particular area. On the other hand, if socio-economic conditions on reserves continue to decline as they have been, we can expect to see increasing numbers of Micmacs, especially the young, migrating to the city to find work and to escape the conditions at home.

There is another point here. Regardless of the size of urban Native populations, it is essential that police be able to communicate with and deal fairly and effectively with the Native people they contact. To this end, several municipal police forces (e.g., Vancouver) have implemented cross-cultural awareness programs for their officers. Such programs not only increase police understanding of the Native social and economic context, but also help to break down racial stereotyping. Reports from respondents in this study suggest that this is a necessary step for municipal police forces in Nova Scotia.

Native policing has not yet undergone a systematic evaluation that would enable final conclusions to be drawn regarding the relative effectiveness of particular programs and their orientation and modes of operation. A federally sponsored Task Force is presently reviewing Native policing with a view to setting policy on future funding.

5.3.5 Native Court Workers

The Native Court Worker Program currently operates in five provinces and the two territories and has been working in some locations since the early 1970's. It is jointly sponsored by the Federal Government and the government of the province or territory in which it is located. The program is managed by Native "carrier" agencies; for example, in Alberta by the Native Counselling Services of Alberta, and in Ontario by a combination of the Ontario Federation of Friendship Centres and certain Native community governments. The carrier agencies are accountable to the funding departments (federally, the Department of Justice) for the operation of the program.

The Court Worker Program was operational for several years in the mid- to late-1970's in Nova Scotia when it was managed by the Union of Nova Scotia Indians. The program ended, in part, due to administrative difficulties and to differences between UNSI and the Province over the program's funding and operation. Respondents for this study who were working in the criminal justice system in Nova Scotia at the time generally felt that the program was useful. A common concern was that court workers were not adequately educated or trained for carrying out their duties, particularly when written reports were required.

Court workers are to assist Native people appearing before the courts, including family court in some provinces, in the following ways:

- arranging for legal aid, if required;
- explaining the charge and the plea options;
- explaining courtroom procedures;
- translating for the client and defence counsel, if requested;
- assisting the client in getting to hearings, trials and meetings with counsel;
- other means of assistance, as appropriate.

Court workers are not to give any form of legal opinion or advice.

In addition to defence counsel, judges, Crown prosecutors and police also usually find benefit in the presence of a well-trained court worker because he/she facilitates the Native client's involvement in court, thus making the entire process more efficient. Court workers are also mandated to assist Native victims and witnesses, although they usually have too little time for this.

Many observers working in the justice system believe that the Native Court Worker Program has never been adequately supported; hence, its perennial problems with inadequate training, staff shortages, staff turnover, and a lack of credibility among many

judges and lawyers. Samuel Stevens notes that "Native Court Workers, being one of the best and most utilized services available to aboriginal people, is a good example of a service which has had to limit the scope of its services because it is overworked, understaffed and underfunded" (Stevens, 1988: 20). If this program is to be considered for implementation in Nova Scotia, the federal and provincial governments will have to seriously address these issues.

Nationally, ongoing development of the Native Court Worker Program is somewhat unclear especially in these times of funding restraints. (Saskatchewan opted out of the program altogether in 1987, citing the need to cut costs in social programming.) A comprehensive assessment of the program recently underway in Ontario should give a good indication of its actual and potential effectiveness.

5.3.6 Diversion, Fine Option and Alternative Measures Programs

LaPrairie points out that only scattered attempts have been made to develop community alternatives programs for probationers in Native communities. Such programs have met considerable success elsewhere in Canada and the United States, however. Similarly, while fine options programs exist throughout the country, they are not formally utilized in Nova Scotia. Pilot projects in the area of juvenile diversion are promising; however, there are no such projects being carried out in Nova Scotia for Micmac youth.

These kinds of programs hold considerable potential for Native communities in Nova Scotia, especially in view of the lack of existing institutional support. They would complement the customary Micmac social control mechanisms of reconciliation and restitution that appear to remain reasonably intact in Micmac society, and they would enable the offender to return to his/her home to find the support that is not available elsewhere in the social service system.

Programs of this kind may well be appropriate for Micmac communities. However, it will be important for such programs (a) to be community controlled, and (b) to be integrated with other components of new and comprehensive social service structures that are being discussed in the communities. For example, diversion, fine option and restitution programs would fit well with the institutionalized involvement of elders and the implementation of community-based courts. The likelihood and success of these developments will depend in large measure on the willingness of federal and provincial governments to recognize and support the aboriginal right to self-government.

5.3.7 Native Justices of the Peace

Ontario has instituted a program whereby Natives are trained and installed as Justices of the Peace in certain areas of the northern part of the province where there are high concentrations of Native people. J. P. appointments have also been made in the Yukon, the Northwest Territories, Alberta, Manitoba and Quebec. While most have been put into place through provincial appointment, there are currently only seven appointments under Section 107 of the *Indian Act* (at St. Regis and Kahnawake).

Like the Native court worker program, the Native J. P. program holds potential for Nova Scotia because of its ability to facilitate understanding and communication between Native and non-Native actors in the justice process. While it could be seen as part of a policy of indigenization, it is generally felt that the Ontario Native J. P. program is effective. On the other hand, one must question the potential effectiveness of the program in Nova Scotia in light of the lack of institutional structures in place for Natives. In other words, how effective can a Native J. P. be if he has no structural recourse, such as community-based diversion projects, to which he can turn? Again, the development of a single program in isolation, without closely coordinated supporting structures, is likely to have little real impact in Nova Scotia.

5.4 Summary Notes

Innovative policies and programs for dealing with the problems experienced by Natives in the criminal justice system are lacking in Canada. In Nova Scotia, the situation is comparatively worse than in much of the rest of the country. LaPrairie maintains that generally we require more research leading to a better understanding of problems and possible solutions. At the same time, she suggests we can start tackling some of the problems already defined by initiating pilot projects and closely evaluating the results. This is another way to define problems and find solutions. To these ends, much more work needs to be done by policy makers and Native community leaders working together.

Further, the work must be done with a view to upholding the principles of *equality* and *equity* in the law as identified in Section 15 of the *Canadian Charter of Rights and Freedoms*.

Part 6
Findings and Recommendations

6.1
General Findings of the Study

1.
Aboriginal people in Nova Scotia are being adversely affected by involvement in the criminal justice system because they are aboriginal. The immediate cause of adverse effects is a series of systemic problems in the justice system that discriminate against aboriginal people in general, including those people living in reserve communities and off-reserve.

2.
The underlying cause for Micmac involvement in the criminal justice system is an historical process of social and economic development that has been thrust on them over the years and that has resulted in a "culture of poverty" and external dependence. These factors are manifested in high unemployment rates, low standards of living, low educational standards, alcoholism, family violence, high suicide rates, broken families, comparatively high rates of incarceration, and comparatively low rates of parole.

3.
Micmacs have two general sets of difficulties with the criminal justice system. First, the system's supporting institutions and programs often lack relevance to the needs of Micmac communities. Second, the existing justice delivery mechanisms are very often ineffective at reaching or working in Micmac communities.

4.
In certain areas of need, alternative institutional supports do not exist. The result is often a dilemma for justice system personnel, especially judges, who have no alternatives to incarceration or probation. In neither case is the offender likely to get the required assistance with regard to an underlying problem.

5.
While support facilities are required in Indian communities, all communities lack the funds and many communities lack the abilities to develop and operate such facilities.

6.
Policies and programs based on cultural differences (indigenization) often treat criminal justice issues superficially, while failing to address the underlying causes of problems, the relations between Indian communities and the non-Indian system, and the specific needs of Indian communities. The RCMP Option 3(b) program is an example.

7.
There does not exist an adequate information base in Nova Scotia regarding the needs of Native communities or the extent and nature of the involvement of Natives in the criminal justice system. Consequently, effective policy and program planning by government would be impossible, assuming that the will existed to undertake such work.

8.
The extent to which innovative solutions can be implemented will depend on the resolution of the following issues:

- the definition and recognition of aboriginal rights to self-government;
- the recognition of aboriginal rights under the Constitution;
- the recognition by the Province of Nova Scotia of Micmac rights to land and resources according to the Treaty of 1752;
- cooperation among all three parties - the federal and provincial governments and the Micmac.

6.2 General Recommendations

Significant changes are required in terms of access to and administration of justice for aboriginal people in Nova Scotia. However, innovative solutions that will have long-term benefits for the Micmac and ultimately for non-Native society will not occur overnight. Therefore Micmac and other governments should consider a phased approach to achieving their goals. In the short-term, programs such as Micmac Court Workers can be implemented. At the same time, the design and implementation of long-term solutions such as a community-based tribal justice system must be ongoing.

1 Causal Factors

The causal factors that account for the disturbing social and economic conditions in reserve communities, together with their attendant cost for Micmacs on an individual and collective basis, should receive the highest priority attention from federal and provincial government policy and decision-makers in the immediate future.

2 Criminal Justice Review

The Micmac of Nova Scotia should undertake a thorough review of the relevance of and the effectiveness of the criminal justice system for Micmac communities on a community-by-community basis, and alternatives to existing structures and functions should be identified for possible development.

3 **Aboriginal Justice Institute**	*The federal and provincial governments should work with the Micmac to establish a Nova Scotia Aboriginal Justice Institute which would be a means for the Micmac to carry out the work referred to above, including the development, implementation and evaluation of new Micmac justice systems. The Institute would also have a monitoring function with respect to possible discrimination against aboriginal people in the criminal justice system. Federal and provincial governments should financially support the Institute on a long-term basis in order that goals could be achieved.*
4 **Information Base**	*The Department of Attorney General of Nova Scotia should undertake to build an information base regarding the comparative involvement of Natives and non-Natives in the criminal justice system. This information should be freely available to Micmac governments and organizations.*
5 **Court Worker Program**	*In light of the immediate need to take remedial action on some of the issues discussed in the report, it is recommended that a Micmac Court Worker Program be designed and implemented. The program must meet the specific needs of Micmac communities, as well as the needs of Micmacs living off-reserve. It must also be adequately funded by federal and provincial governments and be given the opportunity to develop on the basis of effective skills and organization. It should be stressed that a court worker program is only an interim solution that in no way should impede more comprehensive, longer-term developments in the area of community-based justice.*
6 **Provincial Court on Reserve**	*A second immediate step by the Micmac and the Province of Nova Scotia should be the establishment of a regular sitting of Provincial Court in each reserve community.*
7 **Tribal Justice System**	*The Micmac of Nova Scotia should examine, as a long-term goal, the possibility of institutionalizing an autonomous tribal justice system based on indigenous ways of justice. This approach would be taken on a community-by-community basis according to the needs and aspirations of community members. The new Aboriginal Justice Institute would be the focal point of the research and development work and the community liaison required for such an undertaking.*

6.3
Other Findings and Recommendations for Immediate Action

Policing

The role of the police officer as the strict enforcer of laws in reserve communities generally does not meet the needs or correspond to the existing social control mechanisms of the communities.

8
Policing Review

Micmacs should be funded and assisted by the Federal Government to undertake a thorough review of policing for Nova Scotia Micmacs. The study should examine (a) the specific needs of communities, (b) the possible mesh between indigenous means of social control and the criminal justice system, (c) the relevance of other models of Native policing.

9
Alternative Policing Models

Micmacs should be funded and assisted to apply the policing review results referred to in Recommendation 8 to the design of alternative policing models and then to implement those models on a pilot study basis with a thorough evaluation process built in. Successful models should then be funded for full, long-term implementation.

Legal Representation

There are often conceptual differences between Indian accused, especially first offenders and youth, and justice system personnel, including defence counsel. These differences occasionally make communications difficult.

In certain court areas where "plea bargaining" is carried out, a lack of understanding and communication about the issue can lead to a difficult working relationship between counsel and client, and to a loss of credibility for legal aid lawyers generally.

10
Community Liaison

A program of regular liaison should be established between lawyers (including legal aid, the private bar and Crown prosecutors) and Native communities for purposes of education and dialogue.

Legal aid counsel appear to be overburdened in many areas, with the possible effect of inadequate time spent with individual clients.

11
Access to Legal Aid

Nova Scotia Legal Aid should examine the operational effectiveness of its legal counsel program, especially with regard to Native clients.

The Micmac Court Worker Program recommended earlier has as one of its primary responsibilities the ongoing education of Micmacs and justice system personnel regarding the needs and concerns of the other. The Micmac court workers should plan and facilitate the liaison program described above.

Hearings and Trials

In many instances a Native individual is not concerned about the possibility of receiving probation. In view of this, and in view of a high degree of discomfort in the court setting, he/she may plead guilty (whether guilty or not) in order to get through the hearing process and avoid trial.

12
Communication

Defence counsel should ensure that adequate time is spent with the client prior to the hearing in order to establish all facts and the client's guilt or non-guilt.

In many instances, particularly involving elderly individuals, language is a problem for the accused. (This tends to occur more often among people from relatively isolated reserves such as Eskasoni than from certain other reserves due, in part, to relative isolation and adherence to the Micmac language in the former.)

13
Translators

Each court should have an "on-call" translator who can be called if necessary and paid on an hourly basis. Defence counsel or the police should advise the court in advance that an individual may have a language problem.

Individual Micmacs often feel extremely ill at ease and unaware of the court process as they appear for a hearing or a trial. The result can be inaccurate or incomplete communications with the court.

14
Lawyers/Judges

Adequate time should be spent by defence counsel with the client prior to the hearing/trial day. Judges should occasionally become involved in the program of liaison between lawyers and the communities.

Again, the Micmac court workers would be mandated to facilitate such activities.

Sentencing

There appears to be disparity in sentencing (both in favour of and against Natives) to the extent that many judges appear to apply different criteria to Natives than to non-Natives in their sentencing decisions. (This finding is based on discussions with legal counsel and Crown prosecutors, not on the file reviews undertaken in Crown prosecutors' offices.) This conclusion is consistent with the national findings of the Canadian Sentencing Commission.

15
Sentencing Study

In light of the general concerns expressed for Canada in the Sentencing Commission report, and in view of the observations made in this study, the Provincial Government should sponsor an independent examination of comparative sentencing. This study should involve Micmac researchers.

Native offenders - adult and young offenders - are often fined or institutionalized because alternative programs do not exist in their communities.

The fines imposed on Native offenders are generally of the same magnitude as those for non-Native offenders; however, due to considerably lower incomes among Natives, the fine often has a more severe impact on the individual and his/her family.

16
Community Justice Programs

Fine options programs should be established and managed by reserve communities. However, the proper capabilities must first be built in the communities in order to operate and maintain such programs. The Federal Government should support this development. The Alternate Measures Program should be established in reserve communities, again ensuring that adequate support structures are in place first.

Native communities are removed from the process of justice in two ways: (i) the accused is dealt with in a setting removed from the community, thus making attendance by community members difficult; (ii) the offender is not usually made to make restitution to the individual victim or to the community as a whole, but rather to society beyond the reserve.

17
Community-Based Courts

(i) Provincial Court should be established in reserve communities and on a regular basis hear Native cases in that court;

(ii) New programs of restitution (such as Alternative Measures) should be established in reserve communities, first building the effective structures for the operation and maintenance of such programs.

Probation and Parole

Provincial Court judges often order an offender to take a particular treatment program (often in a non-Indian setting) as part of his/her probation. This can result in the offender attending a program that is inappropriate to his/her needs as an individual coming from an Indian community.

18
Institutional Supports

Judges should be familiarized with the institutional supports available and should recommend, first, that an offender be assessed for the need to attend a program, and second, that the offender then attend the most appropriate program. If a system of community-based support is developed, as recommended, then this may be the most appropriate avenue for many Native offenders.

Probation officers often do not locate appropriate respondents for their pre-disposition and pre-sentencing reports. Consequently, they will accept "collateral contacts", a step that is not generally taken in non-Native communities. Additionally, probation officers often find that language barriers and a lack of understanding of their role will interfere with their ability to satisfactorily complete community assessments.

19
Probation

A probation officer capability should be established on-reserve. Staff would require special training and an administrative structure would have to be established.

Aftercare

Aftercare facilities are non-existent on reserves, while the Micmac Friendship Centre is underfunded and overburdened to the extent that it has great difficulty in providing adequate support to its ex-offender residents.

Micmacs, particularly young offenders, generally do not benefit from the experience of aftercare in an institution away from their reserves. This is due in large part to alienation from family, friends and the home community.

20
Aftercare

A comprehensive needs assessment regarding the establishment of a Micmac controlled program of aftercare support should be undertaken in each reserve community. This should be supported technically and financially by the federal and provincial governments.

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Appendices

1
List of Participants, Peer Review Workshop* on "The Mi'kmaq and Criminal Justice in Nova Scotia"

June 16, 1988

*Each of the Commission's research studies was scrutinized in early draft form by experts in the field, and discussed in a workshop format with the Commissioners and Commission staff, the peer reviewers, and invited professional and community experts.

Researcher:
Dr. Scott Clark, G.S. Clark & Assoc., Ottawa

Reviewers:
1. Dr. Carol LaPrairie, Senior Policy Analyst, Department of Justice, Ottawa
2. James R. MacLeod, Native lawyer and member of Evaluation Steering Committee, Northern Paralegal Project; Taylor, McCaffrey, Chapman, Winnipeg
3. Professor Fred Wien, Vice-Chair, Dalhousie Senate; former Director, Maritime School of Social Work, Dalhousie University, Halifax.

Royal Commission:
1. Chief Justice Hickman, Chairman
2. Associate Chief Justice Poitras, Commissioner
3. Honourable Gregory T. Evans, Q.C., Commissioner
4. George MacDonald, Q.C., Counsel
5. David Orsborn, Counsel
6. W. Wylie Spicer, Counsel
7. Susan Ashley, Commission Executive Secretary, Chair of the Workshop
8. John Briggs, Director of Research

Invited Participants:
1. Marie Batiste, Ph.D. Ed., Eskasoni
2. Alison Bernard, Chief, Eskasoni
3. Alex Christmas, President, UNSI, and former Chief, Membertou
4. Dan Christmas, Executive Assistant to President, UNSI
5. Allan Clark, Provincial Coordinator for Aboriginal Affairs, Department of Community Services, Nova Scotia
6. Alex Denny, Grand Captain of Grand Council of the Mikmaw Nation
7. Anne Derrick, Counsel to Donald Marshall, Jr.
8. Noel Doucet, Commissioner of the Nova Scotia Human Rights Commission, former president of UNSI and former Chief, Chapel Island
9. Bernie Francis, representing Terry Paul, Chief, Membertou
10. Roderick Googoo, Vice-President, UNSI, and Chief, Whycocomagh
11. Sakej Henderson, Advisor and non-practicing lawyer representing the Grand Council of the Mikmaw Nation
12. Russell Juriansz, lawyer, Blake, Cassels & Graydon,Toronto, former General Counsel, Canadian Human Rights Commission
13. Doug Keefe, Department of Attorney General, Nova Scotia

14. John Knockwood, Chief, Shubenacadie
15. William MacDonald, Q.C., Deputy Attorney General, Nova Scotia
16. Reg Maloney, Vice-President, UNSI, and former Chief, Shubenacadie
17. Catherine Martin, Coordinator, Micmac Professional Careers Project, Henson College, Dalhousie University
18. Graydon Nicholas, Counsel to UNSI
19. Darrel Pink, Counsel to Department of Attorney General, Nova Scotia
20. Viola Robinson, President, Native Council of Nova Scotia
21. Tony Ross, Counsel to Black United Front
22. Jamie Saunders, Counsel to Department of Attorney General, Nova Scotia
23. Professor Bruce Wildsmith, Counsel to UNSI

2
Submission by Dr. Marie Battiste on Behalf of the Grand Council of the Mikmaw Nation

A Report to the Royal Commission on
the Donald Marshall, Jr., Prosecution

Prepared by
Dr. Marie Battiste
Apamuwek Institute, Eskasoni Reserve
for Grand Council of the
Mikmaw Nation
1988

There is throughout all levels of Nova Scotia society substantial ignorance and much misinformation concerning the Mikmaq, the history of the Grand Council, its unique relationship with the Crown and Church, and the modern legal-political status of the Mikmaw Nation. This ignorance and misinformation, particularly when found in the administration of justice, has a significant negative impact on Mikmaq people. In the absence of an understanding of the unique constitutional status of the Mikmaq, race has become the overriding principle of identity in Nova Scotia.

Biologically speaking, there is no such thing as race. Every human being is a racial mixture. Humanity exhibits a continuum of physical characteristics, each physical "type" shading off into the next. When one confronts this biological reality, it becomes clear that racism is a social construct - a category of perception which is used as a way of classifying and identifying people.

The Canadian immigrants who were and still are unsure of their own roles in society have defined their relationship to Mikmaq in terms of unalterable categories of race which are connected with a certain image of the primitive savage. The belief which connects these two sorts of traits makes otherwise invidious distinctions reasonable. The belief's empirical falsity does not detract from its social force. In our time, racial terms have been imposed on social events to which they are not relevant.

The dilemma of racism in the criminal justice system is at once a sociological reality with political and legal implications and a psychological one for people within the situation. The justice system has made race, instead of legal rights, the overriding principle of organization. Race is the crucial symbol of the Mikmaw social role in Nova Scotian society. Color of the skin has become the criterion of a rigid set of expectations, equating white with civilization and brown with savages.

The legal and political system has maintained and intensified racism through its ignorance of the aboriginal and treaty rights of the Mikmaq. Since the arrival of the Europeans to the ancient lands of the Mikmaq, the allied people, the relentless pendulum swings in policy between tribal "self-determination" and Indian "assimilation"

into provincial society. At the present time, the pendulum swings sometimes appear to be going in several directions at once. Tribal self-determination based on the constitutionally-protected aboriginal and treaty rights is federal policy, but "assimilation" appears to be a Nova Scotia policy, at least in the field of administration of justice.

The Province of Nova Scotia has ignored Mikmaq aboriginal and treaty rights. It has ignored the collective rights of the Mikmaq defined in prerogative Treaties and Acts, and stressed structural differentiation on individual (e.g. racial) grounds. They have maintained that in the administration of justice the "Indians" have a formal equality with other citizens. This assimilationalist philosophy is not present in the delivery of any other services to them. It is unique to the administration of justice.

While at first glance this attitude would seem to fit within traditional notions of equality and fair play, and many non-Indians would no doubt perceive this attitude as pro-Indian, the Grand Council has most often taken quite a different view. The assimilationist philosophy contains many elements, some of which have a surface attraction, such as allowing the Mikmaq to share in the educational material and other benefits of provincial society. There are, however, several basic flaws to this view. The provincial attitude of formal equality of Indians is seen by the Grand Council as another attempt to destroy aboriginal tribal institutions and, in effect, deprives the Mikmaq people of their aboriginal and treaty rights and forces them to assimilate individually into provincial society.

This implicit assimilationist philosophy that governs the administration of justice issue has always been opposed by the Mikmaq, and which is now repudiated by the Federal Government, is a serious barrier to tribal self-determination. It must be noted that the assumption of criminal jurisdiction over Indians since 1940 has not resulted in the integration of Mikmaq into the dominant culture; nor has it provided substantial non-discriminatory services to the Mikmaq. On the contrary, it has alienated the Mikmaq and imprisoned them in federal jails.

A Mikmaw has three possible responses to the knowledge that most Nova Scotians categorize him or her as inferior. Each response has its characteristic political expression. A Mikmaw may adopt the view of himself which the majority has of him; he may believe in his own inferiority and hence the "culture of poverty". Or the Mikmaw may deny the relevance of the category of race altogether, argue for equality and press for integration and attempt to will away the racism. Or the Mikmaw can acknowledge the identity given to him or her by the majority, but not the evaluation, and search for methods of maintaining his or her own values with dignity.

The Grand Council has always chosen the latter method. It is seen as the only authentic choice which affirms and maintains fidelity with our ancestors' legal and political legacy and cultural integrity. The Mikmaq have very little faith in attempting to change the attitude and norms of the dominant society. Because the moral conceptions of what an "Indian" is are rooted in mores, which change slowly, the Council does not think it practical to will away the brown colors from the image of the "wild savage" that haunts the minds of Canadians. This image provided much of the Canadian policy behind infantilism of the Indians and forcing them into total dependence on the dominant social groups.

Placing blame for the images that provide the foundation of the racial basis of the administration of justice is not a viable solution to the problem for the Grand Council. It merely prevents people from seeing the actual problem and acting on it. The Council has always advocated self-help and autonomous authority for their survival.

More importantly, the assimilationist philosophy of the Provincial Government ignores the new constitutional era of Canadian federalism. It ignores that the generality of the Constitution Acts of Canada and the Charter of Rights is limited by existing aboriginal and treaty rights. It continues to wrongfully assume that tribal institutions are transitional to provincial authority, rather than their declared future role as primary structures of future program delivery to Mikmaq. The philosophy assumes that aboriginal and treaty rights are not collective rights, but rather apply to individual Indians because of their race. Most of the provincial arguments, therefore, are cast in terms of extending full citizenship to individuals of a race, with little or no reference to the tribal relationship with the Crown or the meaning of membership in a protected tribal culture.

In an interesting twist of logic and historical reality, the Province also defines Indian tribal identity as separatism, and, hence, unconstitutional segregation. Faced with systemic racism in the province, it is baseline racism to assume that because the cultural rights, traditions and institutions of the Mikmaq are different from the dominant society, they are legally or culturally inferior.

In an attempt to establish collective cultural rights rather than race as proper norms to reinforce differentiation between Mikmaq and the emigre, it is necessary to examine the aboriginal and treaty rights of the Mikmaq in light of the division of criminal authority in Canada and how such treaty jurisdictions should be operated with a national policy objective of tribal "self-determination" and suggest solutions to the problems where warranted.

The Elekewaki Compact, 1752

The constitutional relationship established between the Mikmaw Nation and the British Crown was characterized by prerogative Treaties and Acts. The seminal premise of the relationship was that prior to European colonization and settlement of Mikmakik (the land of friendships), the Grand Council possessed full jurisdiction over their national territory and their allied people.

The Grand Council's legitimate power over their people and property was fully accepted by the Crown as witnessed by the Treaties. In the prerogative Treaties, the Council agreed to delegate certain rights to the Crown, while retaining most of its pre-existing rights. Except as expressly delegated to the Crown, the Grand Council retains its ancient jurisdiction. Under Section 35 of the *Constitution Act, 1982*, both the aboriginal and treaty rights are constitutionally protected tribal jurisdictions. They are part of the Supreme Law of Canada.

The Elekewaki (In the King's House) Compact, 1752, was a clear and outward manifestation of the assent of each party to the new political and legal relationship. The original Treaty of 1752 and its accession treaties (1752-1779) established the pillars of constitutional law in old Nova Scotia. The Crown made it totally clear to the Mikmaq that their treaty rights not only protect and preserve their institutions and cultural values but were also legally enforceable obligations in British law.

The Elekewaki Compact clearly established His Majesty's Civil Law as the guardian of aboriginal and treaty rights. The mutually agreed upon procedure for protecting these rights was provided in Article 8. Article 8 stated:

"That all Disputes whatsoever that may happen to arise between the Indians now at Peace and others [,] His Majesty's Subjects in this Province [,] shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefits, Advantages & Priviledges of any other of His Majesty's Subjects."

In the various accession Treaties of the Hunting Districts of the Grand Council of the Compact, it was mutually agreed with the Crown that "in any case of any quarrel or misunderstanding shall happen betwixt myself and the English, or between them and any of my Tribe, neither I nor they shall take any private satisfaction or Revenge, but we will apply for redress according to the Laws established in his said Majesty's Dominions" (Article V).

Interpreting Article 8 of the Compact and Article V of the accession Treaties, in 1761, the first Chief Justice in Canada, Jonathan Belcher, who was also President of His Majesty's Council

and Commander in Chief of the Province, stated that Treaties created a legal "Wall" and "Hedge" between the Mikmaq and the British settlers. Belcher promised the Grand Council members in the "French territories" that accession to the Compact would place their people on the "wide and fruitful Field of English liberties". He explained to the assembled leaders from all the seven districts of the Mikmaw Nation that their burying of the Hatchets was a "sign of putting [them] in full possession of English protection and Liberty". The "Field of English liberties", Chief Justice Belcher assured them, would be "free from the baneful weeds of Fraud and Subtility". "The Laws", he continued, clearly stating the Crown's intent to create legally binding rights, "will be like a great Hedge about your Rights and properties - if any break this Hedge and hurt or injure you, the heavy weight of the Law will fall upon them and furnish their disobedience" (CO 217/18/276; PANS MSS Doc. Vol. 27, No. 14:699-700).

Article 8 of the Compact and Article V of the accession Treaties evidence the Mikmaq's acceptance of His Majesty's offer to resolve controversies between Mikmaq and the British subjects under the civil law, rather than appeal to political authorities or criminal law. Both the terms of the Compact and the statement of President Belcher induced a reasonable reliance on the rule of law as the guardian of Mikmaq rights. The Compact established the Civil Law of England - the fundamental principles of contract, property, and torts - as the appropriate legal and social standards of conduct between the Mikmaq and British in Nova Scotia.

No part of the Compact provided for criminal regulation of the Mikmaq. Article 8 cannot be construed nor be expanded to cover criminal prosecution. While His Majesty's Instructions to the Governor might have transferred some of its delegated tribal authority under the Compact to the Legislative Assembly, Article 8 cannot be construed to cover criminal prosecution of Mikmaq by the Crown. The Crown could not convey greater authority to the Province than the Grand Council had conveyed to the Crown in the Compact. The Crown's authority was not inherent in North America.

Four years before the Compact and in the same year that the prerogative commission establishing Nova Scotia was created, in 1749, a British royal commission had concluded in a dispute between the royal colony of Connecticut and the Mohegan Tribe that "[t]he Indians, though living amongst the king's subjects in these countries, are separate and distinct people from them, they are treated with as such, they have a polity of their own" hence the law to be applied in relations between the Crown and the Native states in North America was not British law or colonial law but rather "a law equal to both

parties, which is the law of nature and of nations" (Record Book of Proceeding 1743:118).

No prerogative Instruction or Acts of Parliament have ever extended criminal jurisdiction over the Mikmaq personally or over their reserved lands. This fact was first recognized in 1823 by Nova Scotia Judge T.C. Haliburton. Judge Haliburton noted that while the Mikmaq are considered British subjects under their Treaty in respect of their right in royal courts, "yet they never litigate or in any way are impleaded. They have a code of traditional and customary law among themselves" (Nova Scotia 1823:65). The customary law, called "habenquedouic" among the Mikmaq, still exists within the aboriginal powers of the Grand Council.

Judge Haliburton's observations of Mikmaq customary law are consistent with Crown precedents where the aboriginal *lex loci* of Native protectorates continues to be valid law and is sufficient to plead immunity from ordinary legal process, except where otherwise provided by the prerogative Treaties *(Freeman* v. *Fairlie* [1828] 1 Moo. P.C. 305). The treaties of protection with aboriginal peoples were held to have the same legal force as other Empire treaties and were a sound foundation for the exercise of prerogative jurisdiction, independent of Parliament, delegated from the Native sovereign (Piggot, Exterritoriality, 1907:4-9). Lord Kingsdown noted for the Privy Council that Native sovereign's treaty permissions for Englishmen to use their own law in Native territories "does not extend those laws to Natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign" *(Advocate-General of Bengal* v. *Ranee Suree Surnomoye* [1863]).

Additionally, the Crown promised the Mikmaq in Article 8 that when they applied to the civil courts they would have equal protection of the law. Although the Mikmaq were a different jurisdiction from the settlers, before the courts they were to have the "same benefits, Advantages & Privileges as others of his Majesty Subjects". There was no suggestion of the same penalties were involved.

Prerogative Implementation of the Separate Jurisdictions

The Crown's jurisdiction over the British settlers and immigrants to Nova Scotia, the third party beneficiaries of the Compact, were different from the Mikmaq. Article 8 establishes a clear criterion for His Majesty's courts to judge the conduct of the British settlers with the Mikmaq. British civil law clearly defined a universal code to resolve the conflicts inherent in society to maintain collective or individual rights and advantages of the Mikmaq against involuntary losses. It gave the emigres fair warning of the conduct that the Crown expected of them in relation to the Mikmaq.

His Majesty's criminal law was used to apply the civil law standards to the immigrants. The operation of both His Majesty's civil and criminal law provided sufficient legal protection and remedies for any abuse of the Compact or the Mikmaq by the British settlers.

According to His Majesty's promises to extend "Peace and Friendship" to the Mikmaw in Article 2 and 3 of the Compact, the Crown automatically acquired criminal authority over the British settlers. By the operation of British law, all Peace and Friendship Treaties have been construed by the courts to grant His Majesty the authority to carry out His Treaty promises by enacting criminal offences over British activities. Inherent in Article 4 of the Compact was the mutual acceptance of the Crown as the protector of commerce. This authority also extended criminal authority to the trading activities of British subjects in Mikmakik (Chitty 1830:170). These criminal offences are concerned with war, insurrection or rebellion, offences against religion, and trade. They are derived from the ideas of treasonable felony against the Crown and maintaining order among His subjects enjoying extra-territorial privileges by treaties in foreign jurisdictions. Included in the offense was publishing "any libel tending to degrade, revile, or appose to hatred or contempt any foreign sovereign, with intent to disturbe peace and friendship between the United Kingdom and the foreign sovereign" *(Foreign Enlistment Act,* 33 & 34 Vict. c. 90).

In addition to the criminal offences by operation of law, the Crown positively established the Compact as part of the constitution of Nova Scotia. These prerogative Acts affirmed the legal enforceability of the Compact.

British Nova Scotia was controlled entirely by prerogative Instruments of the Crown, such as Letters Patent, Instructions, and Imperial Proclamations until 1867. Colonial officials had no power or authority beyond the terms of these instruments. The King in Council perfected the Compact by entrenching our protected status in the constitution of Nova Scotia.

As noted prior, the 1752 Compact gave no criminal jurisdiction to Nova Scotia. The year 1758 - six years after the Grand Council validated the existing British settlements and trading rights in the Compact - is the accepted date of the reception of both the public and private law of England to Nova Scotia.

The fact that the Compact existed prior to the reception of law to Nova Scotia is of utmost importance. Since within the United Kingdom, a Treaty cannot alter the existing domestic law without subsequent legislative action, the fact that the Compact predated the Legislative Assembly made no legislative implementation necessary to affirm the legal enforceability of aboriginal and treaty rights. In

fact, under the law of the United Kingdom, the reception of English law was conditional upon its suitability with the Compact as well as the 1749 Commission to Cornwallis. As Beamish Murdock, the leading authority of pre-Confederation law in Nova Scotia, stated in his Epitome of the Laws of Nova Scotia in 1832:

"His Majesty's instruction to the governors, His proclamations, commissions, and other acts of government from 1713-1758 have legislative authority, and on them our present constitution is grounded...[W]hen any of these have remained unrepealed and unaffected by subsequent laws, they have a validity and force commensurate with the authority from which they emanated, and the purposes intended for them." (BK I:30, 51)

After the final accession Treaties of the various Mikmaq Hunting Districts under French authority to the Compact in 1761, His Majesty entrenched the Compact in the constitution of Nova Scotia. His Majesty had the option of either directly or indirectly exercising the jurisdictions delegated to the Crown by the Grand Council in the Compact. The Crown choose to indirectly exercise the acquired authority through the Governor of Nova Scotia and to a lesser extent through the Legislative Assembly.

The Crown specifically issued Instructions to Nova Scotia in 1761 under the future power authority of the 1749 Commission that commanded local authorities to keep a "just and faithful Observance of the Treaties and Compacts which have heretofore solemnly entered into with the Nations and Tribes of Indians". "Upon all occasion" it was His Majesty's will that colonial authorities "support and protect the said Indians in their just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into with them".

The Nova Scotia Proclamation of 4 May 1762, 3 Geo.III, made public the 1761 Instructions to both the British settlers and Mikmaq.

The Nova Scotia Assembly affirmatively acknowledged the constitutional authority of the Compact. In 1762, the Assembly enacted an Act to prevent Fraudulent Dealings in the Trade with the Indians (S.N.S. 1762, c. 3) which incorporated the Crown's promises of protection into Nova Scotia law. The enforcement procedure of the Act continued until 1842. The Act stated that because the "Indians" are "unacquainted with the law of this province and in what manner they are to proceed in order to do themselves right", the Lieutenant Governor, Council and Legislative Assembly authorized the: (continued on next page)

"Governor, Lieutenant Governor, or Commander in Chief, upon complaint of any Indians within this promise, made to him or either of them, that they have been wronged or cheated of their furs or any other merchandise, or in any other their trade and dealing with other of His Majesty Subjects; that the Governor, Lieutenant Governor, or Commander in Chief, is hereby desired to direct His Majesty's Attorney General to prosecute the same, either before His Majesty's Justices, or in any of His Majesty's Courts of Record in a summary way, as the laws do direct, and such prosecution shall be deemed legal, and the judgement and execution shall issue accordingly."

In the following year, the 1761 Instructions and the Nova Scotia Proclamation and Act of 1762 were affirmed in the Royal Proclamation, 1763. In the Royal Proclamation the King amplified Imperial policy to colonial governors and subjects by strictly forbidding British occupation and settlement of lands "reserved under our sovereignty, protection, and dominion on behalf of the several Nations and Tribes of Indians with whom we are connected and who live under our protection". As an autochthonous state associated with the Crown by treaty, the Mikmaw Nation was "connected" with, and "protected" by, the Crown. Moreover, the Proclamation provided the Indian trade required a special "License" and a security bond from the Governor of the Colonies to ensure conduct in conformity to its regulation.

The 1763 Proclamation formally enshrined His Majesty's intent to protect the existing Mikmaq aboriginal and treaty jurisdictions directly under prerogative jurisdiction and the civil courts as against colonial authority and subjects. The Supreme Court of Canada in the *Guerin* case affirmed this - since the Proclamation the Crown has always had a fiduciary or trust responsibility toward the protected aboriginal states. Thus, after 1763, no subject or officer of Great Britain possessed authority to interfere with the protected territorial or personal jurisdiction of the Grand Council as a matter of imperial regulation limiting the constitutional authority of the British colonies in North America.

Generally speaking, prior to Confederation the Province of Nova Scotia never exercised exclusive jurisdiction over Indians and Indian Reserves. Since Nova Scotia was a royal colony, the prerogative Treaties and Acts of the Grand Council acted as jurisdictional limitations on the actions of the Province. As Mikmaq came into increasing conflict with the immigrants who encroached on their reserved Hunting Grounds, however, the administration of justice was not found sufficient to overcome the local ill feeling and racism of the new European settlers. The local courts often became the deadliest enemies of the Indians.

Consistent with the Compact and the prerogative Acts, between 1842-1867, the Nova Scotia Assembly enacted the *Indian Act* and *Indian Reserve Act* to protect Lands reserved for the Mikmaq from intrusion or unauthorized settlements. These Acts authorized the Commissioner of Indian Affairs to "proceed by information in the name of Her Majesty before Her Majesty's Supreme Court at Halifax or in the County where the Lands may lie, notwithstanding the legal title by Grant or otherwise, may not be vested in Her Majesty" (S.N.S. 1842, Section V).

Notwithstanding these Acts, the administration of justice failed the Crown and the Mikmaq. By 1845, the Indian Commissioner reported to the Nova Scotia Assembly the problem with the administration of justice under the *Indian Act:*

"No lenient measures will make any impression on these settlers (i.e. trespassers). The Commissioners being now armed with the full authority of the legislative enactment, will feel themselves bound, if continued in office, to take immediate and determined action on that statute, in order to secure to the Indians the full benefit of the lands set apart for their use and maintenance. To effect this end, the most uncompromising proceedings alone will succeed."

Additionally, the Commissioner emphasized an inherent conflict of interest. "It will not be easy for any Commissioner to hold a seat in the Provincial Assembly" the Commission stated, "to do justice to the Indians, and to retain the good will of his constituents" (LJNS 1845:170).

Seven years after the enactment of the *Indian Act*, by 1849, it was obvious that Her Majesty's Courts in Nova Scotia refused to enforce either the Compact, the prerogative Instructions, or the *Indian Act*. The Indian Commissioner reported to the Legislative Assembly that:

"Under present circumstances, no adequate protection can be obtained for Indian property. It would be vain to seek a verdict from any jury in this Island against the trespassers on the Reserves; nor perhaps would a member of the Bar be found willingly and effectually to advocate the cause of the Indians, inasmuch as he would thereby injure his own prospect, by damaging his popularity." (LANSJ 1849:356)

The Commissioner suggested that the only remedy to this lawless situation was to confer "on the heads of Indian families the right to vote at the election of the Members of Assembly" based on this reserved lands (LANSJ 1849:359). This suggestion was ignored. The situation steadily deteriorated until Confederation. The more

statutory enactments passed by Nova Scotia, the more the trespassers threatened the Mikmaq with firearms, harassed their women and prevented the Mikmaq from using the King's Road (LANSJ 1851:233).

The failure of the rule of law for the Mikmaq in Nova Scotia was a common predicament of aboriginals in the British settlements. After reviewing the position of the aborigines in the United Kingdom, the Report of the Select Committee of the Imperial Parliament established a policy against local control or trust administration in the British settlements. "[T]he settlers in almost every Colony, having either disputes to adjust with the Native tribes, or claims to urge against them, the representative body is virtually a party," the Report stated, "and therefore ought not to be the judge in such controversies". It argued that local control over the aboriginal should be withdrawn as far as possible to either London or to the Governors of the respective colonies. Moreover, it stated the Imperial policy that "in the formation of any new colonial constitution, or in the amendment of any which now exist, we think the initiative of all enactments affecting the Aborigines should be vested in the officer administering the Government; and that no law should take effect until it has been expressly sanctioned by the Queen" (Command Papers 26 June 1837:77).

In simple terms, the Committee urged preserving a direct trust in the Sovereign over all Native peoples, even where no such connection has been established by treaty, and removing Natives for the legislative authority of all local authority. In drafting the *Constitution Act, 1867*, the Imperial Parliament made sure that both criminal law and the control of Indian affairs were removed from local control to federal control. The Imperial Parliament felt the need to grant to the new federal government the authority to enact the *Criminal Code* as well as to take away provincial authority over Indian affairs.

Transfer of Jurisdiction Over Indians to the Federal Government

In Section 91 (24) of the *Constitution Act, 1867* the Provinces of Nova Scotia and New Brunswick, and Canada, with the approval of the Imperial Parliament and Queen, agreed to transfer all personal and territorial jurisdiction over Indians to the newly created federal government. There was no jurisdiction over Indians and their lands reserved by Nova Scotia. Neither Nova Scotia or the Imperial Parliament or the Queen had much authority over the Mikmaq or their lands under the Compact, nevertheless they transferred the administration of the prerogative obligations to the national Government. Authority over non-Indian residents in the Crown

colony of Nova Scotia in the *Constitution Act, 1867* was divided between the Federal Government and the Province.

The newly created Federal Government received many pre-existing prerogative rights and obligations that protected the Mikmaq Nation. The Crown authorized the national government to "perfor[m] the Obligation of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries" (Sec. 132). Since the Crown never had denounced its Compact and Treaties with the Grand Council and had assured the Council that its treaty rights would be transferred to the national government, either under Section 132 or 91(24), the Federal Government succeeded to the rights and obligations of the Compact. Section 35 of the *Constitution Act, 1982* affirmatively recognized our existing aboriginal and treaty rights as part of the Supreme Law of the Land.

The prerogative Instructions and Acts were inalterably entrenched into the constitution of Canada. This included the 1761 Instruction, the Nova Scotia Proclamation of 1762, and the 1763 Proclamation. Since neither the federal nor provincial legislatures could amend their constitutions, these prerogative acts were never repealed. Moreover, it was clearly established that the Federal Government could not delegate any of its constitutional powers to the Province of Nova Scotia *(A.G. of Nova Scotia* v. *A.G. Canada* [1951] S.C.R. 31).

Even if the Crown has desired to create new rights in the Canadian federation of provinces in the *Constitution Act, 1867,* under British law the Crown could not have delegated to Canada in 1867 what it had not been delegated from the Grand Council in the prerogative Treaties. Since the Grand Council had not granted any authority to the Crown to extend the criminal law to Mikmaq conduct, regardless of place of the conflict or the victim, the Crown could not pass such authority to Nova Scotia or Canada.

In other parts of Canada, beginning with Treaty 2, the signatory tribes agreed to criminal jurisdiction off the reserved lands of Canada. They promised that they "will, in all respects, obey and abide by the law" and will aid in prosecuting offences against local law in the country ceded. Most of the numbered treaties specifically authorize the enforcement of federal Indian liquor laws on reserved lands. The "obey and abide" jurisdictional clauses demonstrates that neither the federal laws or provincial administration of justice applied to reserves without their express consent. Thus, other treaties resolved the issues of criminal jurisdiction over Indians and their reserved lands in Canada, rather than federal statutes and provincial courts which implemented the treaty rights.

Unfortunately, the introduction of Social Darwinism had more force over Indian policy and law in Canada than the intent of the

Constitution Act, 1867. Part of Darwin's theory of natural selection - the idea of the survival of the fittest in the struggle for scarce resources - was appropriated to political thought. Darwin's theory was taken in British thought to mean that man is the culmination of evolution, and that successful cultures were dominant because they were best and deserved to be dominant. The *Constitution Act* became viewed as a document about the white people. The Indians controlled by a federal *Indian Act* and the Department of Indian Affairs. The Department became the champion of assimilation of the individual Indian to provincial citizens through the destruction of tribal institutions of government.

Under the federal *Indian Act,* the designated Minister generally had the power to define for legal purposes who is an "Indian" [Sec. 5-17]. "Indian" became the term that emphasized race and excluded them from equal participation in Canada. Under these sections, the Department enacted and enforced laws and policies destructive of our tribal communion and family life. Until 30 years ago, the Department reclassified individuals involuntarily as non-"Indians", automatically depriving them of the aboriginal and treaty rights as well as their right to reside in their natal communities. This "enfranchisement" policy, so-called because in many provinces it was a condition of acquiring the right to vote and participate in public life, was applied to educated Mikmaq, those seeking employment off the reserve, as well as those enlisted in the Canadian Armed Forces without their consent. Additionally, the *Indian Act* provided that a Mikmaw woman, by marrying a non-"Indian" man, irrevocably lost her status as an Indian and her aboriginal, treaty and statutory rights.

The practical effect of this racist definition of "Indians" was to undermine tribal society, legally, politically, and culturally. This was not a hidden purpose; it was candidly explained by Canada's Deputy Superintendent-General of Indian Affairs in 1920: "Our goal is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question and no Indian Department, [and] that is the whole object of the *Indian Act* (PAC R610 6810/470203/7). The *Indian Act* codified this frozen prejudice.

Consistent with this overriding purpose, the Department removed our children against our will to "residential schools" managed by public or private organizations. At these residential schools, Mikmaq youths were imprisoned like convicts, beaten for speaking their own language, and often forbidden to communicate with their families. Three generations of our people were embittered, and all our families were separated by this program.

The segregation of the Mikmaq on the reserves appeared late in Canadian history. While formal reservation of Land for the Mikmaq began in 1763, segregation did not begin until the centralization era during World War II. The centralization policy, developed and implemented while our men were fighting against totalitarianism in Europe, sought to accumulate the Mikmaq on two "reserves" in Nova Scotia and then to terminate our political status, both with the object of involuntary assimilation. Prior to that time, the Mikmaq continued their traditional migratory pattern through Mikmakik. The Mikmaq, inasmuch as was possible, ignored the Department; they refused to live permanently on the limited reserves and to be totally controlled by the Department. Instead they migrated through their reserved Hunting Grounds, as much as possible, hunting, fishing, trapping and establishing summer farms and were basically self-sufficient. Centralization ended this way of life and created instant overcrowded ghettos with abject poverty and family conflicts.

Since the Grand Council objected to centralization, to the Departmental authority, and refused to administer governmental relief, the Department of Indian Affairs unilaterally created 12 artificial *Indian Act* Band Chiefs and Councils in 1960. The Department divided up the trust funds and reserves of the Council among these bureaucratic agencies.

In less than ten years after creating Band Councils, in 1969, the Federal Government finally sought to officially terminate the special legal and political status of Indians. In its 1969 White Paper, the Federal Government's implicit policy became explicit. The Government argued that "equality", or "non-discrimination" as it was often phrased, was the key ingredient in a solution to the problems of Indians, and that their special rights had been the major cause of their poverty and resulting problems (DIAND 1969). The goal of equality was to be achieved by terminating the aboriginal and treaty rights and the bureaucracy that had been developed to protect those rights, and by transferring to the provinces the responsibility for administering services to Indians. In the future, Indian people would receive the same services from the same sources as other Canadians after a transitional period in which enriched programs of economic development were to be offered. By implication, the result of the policy would see Indians with "Indian problems" become provincial citizens with regular citizens' problems.

The White Paper's policy was essentially one of "formal equality", to use Cairns' phrase from the Hawthorn Report (1966), but the question remained as to whether it would foster equality of opportunity for this oppressed and disadvantaged minority. Three years prior to the White Paper, the Hawthorn Report had concluded that "the equal treatment in law and services of a people who at the

present time do not have equal competitive capacities will not suffice for the attainment of substantial socio-economic equality" (1966:392).

The "unorganized" Grand Council and Mikmaq, similar to other tribes across Canada, resounded with tribalism unparalleled in Canadian history. By Spring 1971, the White Paper was formally withdrawn by the Government, but remained as the unofficial policy of the government. The Federal Government still contracts with Nova Scotia to provide essential services to Mikmaq such as education, child welfare, et cetera, thus creating a fiscal interest in the province for continued funding.

The Self-Determination Era

The assimilation era ended in 1973. On the 5th of July, the Queen assured the Mikmaq leaders in 1973 that "my Government of Canada recognizes the importance of full compliance with the spirit and terms of your Treaties." With the Queen's assurances, the tribal self-determination and restoration of aboriginal and treaty rights movement began. The movement successfully ended with the *Constitution Act, 1982*.

It is almost a sociological law that institutions like the Department of Indian Affairs persist, once established, unless they are deliberately changed. The *Constitution Act, 1982* was such a deliberate change. Yet, the effects of the Social Darwinism regime of organizing Canadian society around the concept of race of an individual, and compounded effects of a century of assimilation laws and policies, continue to hinder the implementation of the constitutional rights in Nova Scotia. The legacy of the assimilation policy still continues to adversely affect self-determination.

After 1867 the Province had little, if any, authority over Indian activities or the Lands reserved for them. Under Section 91 (24), the Federal Government had pre-empted any provincial jurisdiction over these twin subject matters. What authority the Province had was through local judicial interpretation.

The unitary federal authority over Indians was never viewed as an unfettered power; it was always limited by prerogative Treaties with the original Canadian nations and tribes. Today, that limitation is clearly subjected to constitutional limitations of aboriginal and treaty rights as well as legal obligations arising from its fiduciary role toward nations and tribes of Indians (*Guerin*).

Since Confederation, the Grand Council has always objected to assertions of provincial and federal authority which conflict with the spirit and terms of the prerogative Treaties. Since the Queen's affirmation of full compliance with the agreements with the Indian nations, controversies surrounding provincial authority generally fall

within three specific areas: hunting and fishing rights, trading rights and jurisdiction of program delivery.

Hunting and fishing rights have always been the focus of much provincial concern and litigation. In 1929, Grand Chief Sylliboy originally challenged the assertion of provincial criminal authority over Indians off reserve. He asserted a 1752 Treaty immunity from the *Lands and Forest Act* - the Crown promising that the said Tribe of Indians "shall not be hindered from but have free liberty to hunt and fish as usual".

In ruling on these rights, in 1929, acting county court judge Patterson established the "savage rights rule" upon which all Nova Scotia's claims to jurisdiction over Indians was based. Patterson the Judge held that the "savages' right to sovereignty ... were never recognized" by the Crown; that the 1752 Treaty was not a treaty at all since Cornwallis' commission did not authorize Governor Hopson to make a treaty; and that the statute prohibited everyone from hunting during certain seasons. Interestingly from a racial and legal point of view, this decision of an acting county court judge was considered so important by the Canadian legal profession that it was published in the first Dominion Law Report ([1929] 1 D.L.R. 307).

Since 1975, however, the *Sylliboy* case's holding and opinions have totally been overruled by the Nova Scotia Court of Appeals (*R.* v. *Isaac* (1975) 13 N.S.R. (2d) 460 (N.S.S.C.A.D.)) and by the Supreme Court of Canada (*Simon* v. *Queen* [1985] 2 S.C.R. 387; (1982) 49 N.S.R. (2d) 566). In fact, the developed law is uniquely consistent - consistent in favour of Mikmaq hunting rights on reserve (*Isaac* 1975) and off-reserve (*Simon* 1985) free from practically all provincial intrusion. Both the Royal Proclamation of 1763 and the Treaty of 1752 have been found to protect the Mikmaq hunters from provincial laws.

The Supreme Court of Canada in *Simon* unanimously affirmed the validity of the Treaty of 1752. The decision effectively ended the savage rights rule. The justices noted the arguments and language used in the *Sylliboy* decision "reflects the biases and prejudices of another era in our history" that is no longer acceptable in Canadian law. The justices held that "both the Governor and the Micmac entered into the Treaty with the intent to create mutually binding obligations which would be solemnly respected." More importantly the Court noted that the Treaty "also provided a mechanism for dispute resolution". This agreed upon dispute resolution between the Crown and the Mikmaq in Article 8 was solely for civil jurisdiction not criminal jurisdiction.

The Supreme Court of Canada overruled the Nova Scotia Court of Appeal that treaty-protected hunting rights outside the reserves were extinguished by provincial law. The Justices held that neither the

Treaty nor its rights had ever been terminated, or limited. While the Supreme Court recognized that a treaty right could be terminated, it did not express its view on that issue. However, as a matter of criminal evidence, the Supreme Court firmly established that the Province needs to introduce clear and unequivocal evidence to terminate treaty rights; inconclusive or conflicting evidence could not terminate treaty rights.

With the *Simon* decision, the entire support of provincial criminal jurisdiction over Indians was eroded. The implications have not been clearly understood nor addressed by the Federal Government, the Province or the courts. The Grand Council views this as another manifestation of systemic racism. When a Mikmaw loses an aboriginal or treaty rights case, both the Federal Government and the Province assumes the complete loss of all collective Mikmaq rights. However, when a Mikmaw wins such a case, even in the highest courts of the land, the case is only applied to that individual.

In 1975, Chief Justice MacKeigan of the Supreme Court of Nova Scotia Appeal Division, in the *Isaac* case, answered affirmatively the question "should the Nova Scotia Act be treated as if it contained an unwritten clause exempting Indians hunting on Indian reserves." After a historical review which discussed the original rights of the Mikmaq, their Treaties, and prerogative Instructions, especially the Royal Proclamation and the *Constitution Act, 1867,* he concluded that Section 91 (24) provided an implied exemption for Indians and Lands reserved for Indians to the Province's legislative power under Section 92. Federal exclusivity of power over Indians and their lands excluded the provincial game law from applying to an Indian reserve. The *Simon* decision expanded that decision to include Indians off the reserves.

Since the Marshall Inquiry, the allegations of discriminatory treatment of Indians by the entire panoply of administration of law and justice in Nova Scotia has focussed the Grand Council's attention back on criminal jurisdiction. In the past decade, most of the large Mikmaq communities have taken over the policing of the reserves because of the inadequacy of the RCMP as well as widespread belief that major discrimination in the provision of law enforcement existed.

The evidence presented at the Marshall Inquiry has shown that systemic racism is present in the present administration of law and justice in Nova Scotia. It shows that the administration of justice is based on a questionable assumption: that the Province has authority over Indians because they reside within the territorial limits of the province. It was the race of Donald Marshall, Jr. which distinguished him from others in the administration of justice, not his constitutional rights and legal immunities from provincial jurisdiction. He was

treated as any other citizen of Nova Scotia, regardless of his special constitutional position. The evidence shows that the Province has continually ignored the aboriginal and treaty immunities (now protected under Section 35 of the *Constitution Act, 1982)*, the absence of treaty delegation of criminal authority to the Crown over Mikmaq, and Nova Scotia's transfer of personal and territorial jurisdiction to the Federal Government over Indians and Land reserved for Indians at Confederation. Maybe these assumptions were reasonable in 1971, but not anymore.

Additionally, the Inquiry has shown that the courts are not independent from the political processes in Nova Scotia, although they should be. The administration of justice in Nova Scotia has begun to openly resemble first administrative, then other political institutions. The courts implicitly credit one group of people with an inherent right to govern and permanently occupy a dominant position - the immigrants. From the position of aboriginal and treaty rights, the courts appear to unreflectively rule on political expedience, a way of getting what one group of people desire, without any commitment to legal rights of the Natives. The provincial courts are expected to preserve the existing inequalities between the immigrants and the Natives under the guise of legal generality and autonomy.

To the Mikmaq, all the provincial conceptions of law witness a structure of racial domination. All provincial authority seems mere prejudices of another era, a colonial society where racial whim produced political arrangements for which no independent justification can be found. Every judicial case concerning aboriginal and treaty rights forces judges to decide, at least implicitly, which of the competing sets of beliefs and sovereign commands in a diverse society should be given priority. The decisions are seen as self-interested and racial, thus adjudication aggravates, rather than resolves, the problem of unjustifiable power. This is an unfortunate event, for the rule of law has been truly said to be the soul of the modern state.

Being enclosed in this environment accounts for a basic, common experience of Mikmaq behaviors that would otherwise remain unintelligible: the sense of being surrounded by injustice without knowing where justice lies. This condition is the political side of the more general sentiment of a despairing acceptance of the existing order which aimlessly shifts from one pattern of inequality to another. Moreover, the condition is marked by a prevailing absurdity which gradually enters into the consciousness of every Mikmaw.

A crucial factor in the resolution of this predicament was the enshrining of aboriginal and treaty rights in the Constitution. This movement was an attempt to overcome our disorientation; the need to discover a good that had become hidden. A search for moral and

legal understanding that becomes inseparable from the struggle to live in a society whose arrangements do not irremediably distort the ancient political and moral vision of the Mikmaq people. The reaffirming of our special Crown rights and immunities gave the Mikmaq a mission to correct the corruption of our legal legacy by racism and its injustices and striving toward a just rule of law whereby power can be effectively constrained by laws.

The *Constitution Act, 1982* and the *Charter of Rights and Freedoms* make it clear that no other constitutional provision can be used in a way that will interfere with any special rights that the Mikmaq have or may acquire. They formally end the assimilation era. Section 35 ends a century of doubt and states that the existing aboriginal and treaty rights of the Mikmaq are recognized and affirmed as part of the Supreme Law of the Land. But in further protection of Mikmaq rights, traditions, customs, and culture, the generality of the Canadian Charter which establishes basic rights for all Canadians is also limited by our aboriginal and treaty rights. These constitutional provisions attempt to remedy errors of the past and to ensure that any generality of the law will not compromise any aboriginal and treaty rights.

The affirmation of aboriginal and treaty rights grants the Grand Council formal equality with the Province. The Grand Council has no less authority over Mikmaq and their lands as does the Province over immigrants and their lands. The original separation of powers is reaffirmed.

The Grand Council perceives the tribal-Crown relationship as one between sovereigns, based on treaty and negotiation, and rooted in the exclusive fiduciary responsibility that the Federal Government has to the Mikmaw Nation. From this perspective, the Council perceives it has an existing aboriginal right to provide for administration of justice under the federal *Criminal Code* for all Mikmaw and in all Lands reserved for them. These pre-existing rights were never delegated to the Crown in any Treaty, thus it is still reserved to the Council under our constitutionally-protected aboriginal rights. This is not a startling discovery in Canada. Canadian federalism consists of a constellation of governments, rather than an association of individuals held together by a single government.

The federal *Criminal Code,* as well as the criminal sections in the *Indian Act,* placed the primary responsibility for the prosecution of the crimes involving Mikmaq and on their reserved lands under the Federal Government. The provinces have constitutional authority to create criminal courts for non-Indian residents.

Under the restoration of aboriginal and treaty rights, the scope of the reserved tribal jurisdiction of the Grand Council over criminal

matters in federal law is open ended. The scope is a matter for negotiation with the Federal Government. What has been clearly stated in Section 88 of the *Indian Act* by the federal Parliament is - that no laws of general application in Nova Scotia are applicable to Mikmaq or their reserves under the Compact, 1752, prerogative Instructions, the Royal Proclamation 1763, the *Constitution Act, 1867*, and the *Constitution Act, 1982*. Additionally, the federal Parliament has stated that no general law of Nova Scotia can be inconsistent with any federal act, in particular, the *Indian Act*, or any order, rule, regulation or Band by-law, under aboriginal and treaty rights. This view is affirmed and strengthened in the *Constitution Act, 1982*.

In terms of delegated federal powers to Band Councils, the *Indian Act* argues that some federal criminal law and procedures exist. The councils of the Band have authority to make law not inconsistent with federal law for the purpose of the observation of law and order, regulation of traffic, prevention of disorderly conduct and nuisances, the regulation of trade and public games, ancillary authorities (Sec. 81). The councils are delegated "the imposition of summary conviction of a fine not exceeding one hundred dollars or imprisonment for a term not exceeding thirty days, or both," for violation of Band by-laws (Sec. 81 (r) R.S.C., 1970 c. 149, s. 80). This authority alone is a sufficient starting point to create independent tribal courts and code of procedure over some criminal matters on reserves.

In the 1983 Report of the Special Committee on Indian Self-Government to the House of Commons, the Committee acknowledged the Department's historical suppression of tribal governments was an error and are now seeking to change this state of affairs. It would establish a new relation with the traditional governments as well as constitutionally entrench new forms of "Indian" governments outside of the antiquated policy basis and structure of the *Indian Act*. In the meantime, the Committee recommended legislation under the authority of Section 91 (24) of the *Constitution Act, 1867* designed to occupy all areas of competence necessary to permit tribal governments to govern themselves effectively and to ensure that provincial laws would not apply on Indian lands except by agreement of the aboriginal people. In particular, the Committee recommends that Indian governments "should have the authority to legislate in such areas as social and cultural development, including education and family relations, lands and resource use, revenue-raising, economic and commercial development, and justice and law enforcement" (Canada 1983:64). The Grand Council concurs with these policy decisions.

Conclusions

Faced with the systemic nature of racism in the provincial administration of justice, it is impossible to contain the prejudicial treatment of Mikmaq. The way in which the administration of justice is organized in daily life - usually unconsciously - serves first to reinforce racial discrimination and secondly to reinforce the legitimacy of the distinctions. Little thought is given to Mikmaq legal or cultural rights.

Faced with that reality, it is clear to the Grand Council that the administration of justice must be transferred to federal authority. Admittedly, the federal courts may have the similar value contagion as the provincial courts, but they are supposed to understand Indian jurisdictions. It is easier to educate and sensitize a limited federal court than to institute massive changes in the provincial system. If all Mikmaq had to be tried in federal courts, an appropriate legal aid, staffing, and sentencing policy would have to be developed. The Council does not see that this could happen in every provincial court situation.

At the same time, tribal courts could be initiated on both the mainland and Cape Breton Island. This is a longer term solution, but the final solution to racism. It has worked adequately in the United States and in other places around the world, and if given the chance will evolve into a proud institution in Canada. Cultural values do not sustain themselves; they require sustenance from tribal structures. Tribal courts can sustain the best of our cultural values in a modern context and prevent reserves from becoming the breeding grounds for marginal men and women who account for so much of modern crime.

The lessons to be learned from the Marshall Inquiry are valuable to the Mikmaq. The Mikmaq have learned that Nova Scotia justice is not neutral; the system has its prejudices and its political intrigues. Her Majesty's Law and our view of Nova Scotia justice will no longer be protected by its mythology of fairness. For a short period of time, the Law had replaced our old legends concerned with half-human heroes and tricksters. Her Majesty's Law was seen as the culture-hero who protects the tribes from the alien tricksters. Most Mikmaq are convinced that they receive public aid because of the Compact and the trust responsibility of the Federal Government, not because they are needy citizens. Most also believe that only our aboriginal and treaty rights stand between them and termination of their limited self-governing status in federal law.

For two centuries, the Mikmaq have directly witnessed the failure of Her Majesty's Law in Nova Scotia and other provinces and in Canada to protect them. They have experienced the dark side of democracy. Because we are the underclass in Canadian society, our

visibility is low, political resistance minimal, we are the underclass, the incentive for the majority to take advantage of legal discrimination to confiscate our wealth has been great. Nova Scotians as a whole have not been threatened by cruelties to Mikmaq and the oppression of our rights.

What Nova Scotians did not learn is that success in victimizing a minority emboldens government and endows discriminatory principles of law with a certain aura of precedent and familiarity. The discriminatory treatment of unpopular minorities creates dangerous innovation in law. Once accustomed and commonplace, the discrimination principles always seem less cruel and easier to generalize. After a time, there is no longer a minority and majority. The discriminatory exception has become the oppressive rule.
In the brief history of Europeans in America, Indian law has been a bellwether of American authoritarianism. The growth of the bureaucracy dealing with the aboriginal peoples has fore-shadowed, both in the United States and Canada, the rise of general social welfare and economic regulatory agencies. The Department of Indian Affairs' assimilation program was the first great test of the modern conceit that society can be reshaped according to an externally conceived ideal - and the first demonstration, sadly overlooked, that problems are not solved by increasing public intervention and spending indefinitely. After more than two centuries of "protective" supervision, Mikmaq are still poorer and less healthy than other Canadians. And Mikmaq society has been made entirely subject to, and dependent on civil service.

The Grand Council has fought through this concept of the Canadian Herrenvolk (master race) democracy and finally entrenched, again, our aboriginal and treaty rights. We have helped clarify our treaty rights before the highest courts in Nova Scotia and Canada. But still there is a blatant discrepancy between our constitutional rights and Nova Scotia's administration of justice. This is another battle that the Mikmaq will have to fight. The Commission is one opportunity to move the administration of justice over Indians away from oppression and into the constitutional era.

Recommendations

1.
The administration of the *Criminal Code* on any land which is reserved for the Mikmaq, which is conceived of as the Federal Government exercising concurrent jurisdiction with the Grand Council, should specifically reserve to the tribal courts any specific areas secured to the exclusive jurisdiction of the tribe by Treaty; any intra-Indian conflicts, crimes against property and victimless crimes; and the right to pre-empt provincial procedures and regulations by

punishing Mikmaq through the law of the tribe (no matter what the offense or against whom); the right to initiate extradition of Mikmaq to federal or provincial courts; and the right to have the conflict removed to federal and provincial courts.

2.
Significant additional financial and technical assistance from the Federal Government should be provided to establish and maintain two tribal courts in Nova Scotia (one on the mainland and another on Cape Breton Island) and for the development of tribal law and order codes. The federal courts should not only supervise tribal courts but also act as the tribal appellate court. Fines should help support the tribal court system.

3.
The administration of justice for the Mikmaq outside the reserved lands should rest primarily with the federal courts rather than the provincial courts. Provisions should be made in the immediate future that federal courts should have one or two of their staff, a special court workers program and defence attorneys specifically designated with responsibility for Mikmaq matters and crimes prosecution on a long-term basis to assure cultural and legal expertise and familiarity.

4.
To assist the staff, attorneys and Justices of the federal courts in becoming sensitive to Mikmaq history, aboriginal and treaty rights, and cultural values, the Federal Government should allocate sufficient resources so that a mandatory training program and continuing education of the Bar and judges should be administered.

5.
As a corollary to the above provisions, the federal and tribal courts should have exclusive criminal jurisdiction over questions of Aboriginal and Treaty rights - especially hunting, fishing, trapping, gathering, and economic rights - as well as child welfare and custody to ensure long-term expertise and familiarity.

6.
Provision should be made in the immediate future for funds to vindicate aboriginal and treaty rights. Federal court rules should include specific legislative provision for the recovery of attorney fees and expenses against any litigant adverse to the vindication of an aboriginal and treaty right brought by or against a Mikmaw, where the Mikmaw prevails in such a suit. Of particular importance are

situations where the exercise of rights is frustrated by acts or omission of the Province.

7.
The various federal Crown prosecutors should be required to develop standards for their decisions on which cases will be prosecuted and which declined. There should be provision for meaningful tribal or Band input and participation in all cases specifically requested by the tribe or Bands to be prosecuted should be given priority consideration. In addition, where the Crown declines prosecution, the cases could be immediately referred to the affected tribal court for a determination as to whether it will prosecute under tribal law. Appropriations for Parliament or Treasury Board should designate funds for that purpose.

8.
The Federal Government should allocate sufficient resources so that a comprehensive program of education for non-Indians can be conducted to inform the public about aboriginal and treaty rights as the distinguishing feature of Mikmaq culture rather than race.

9.
To the extent that the Federal Government may be determined not to have the recommended authority, the Federal Government should totally fund these recommendations within the provincial administration of justice and educational systems.

10.
Both the Federal Government and the Province should cooperatively allocate sufficient resources so that a comprehensive teaching program of aboriginal and treaty rights for non-Indians can be conducted to replace the racial standard of differentiation in Nova Scotia; such programs should include an evaluation of the history and civics curricula utilized by elementary, secondary, and higher education institutions, the identification of gaps and inaccuracies in such curricula, and the provision of model curricula which accurately reflects Mikmaq history, tribal rights and culture.

3
Submission by Ms. Viola Robinson on Behalf of the Native Council of Nova Scotia

June 22, 1988

I wish to formally in writing state the issues which the Native Council of Nova Scotia, the representative organization of the off-reserve Micmac in Nova Scotia, consider important for consideration.

Although I understand that the report is preliminary, for all intents and purposes it concentrated on on-reserve Micmac and recommendations which on preliminary review would not be accessible to the larger proportion of off-reservation Micmac.

Without impinging on the efforts of the Commission in dealing with its central objective, nor to colour ancillary findings as to whether or not Native people are at a marked disadvantage when brought before the law as administered in Nova Scotia, I believe that the following must be carefully considered and noted.

First, are citizens of Nova Scotia prepared to accept today in 1988 that there exist two distinct societies of people in Nova Scotia? The original People - the Micmac who occupied these lands for well over 10,000 years as a distinct society of peoples, and other Nova Scotians who came to these lands from foreign parts of the world within the last 400 years to form the other distinct society of peoples - non-aboriginal Nova Scotians.

Second, are citizens of Nova Scotia prepared to renounce the past practices of assimilation and belief that the Micmac people were and are inferior to the majority society because the Micmac are a people of a different society, with different language, customs, understanding, outlook on life? The difference as characterized between the non-aboriginal homo-centric worldview society and the aboriginal eco-centric worldview society.

Third, are citizens of Nova Scotia prepared to acknowledge that in the early seventeenth century the forefathers of both societies agreed to live in peace and respect the rights of both societies, and in the event of dispute whatsoever may happen to arise between them, that they shall be "tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefits, advantages and privileges as any others of His Majesty's Subjects"?

Fourth, are the citizens of Nova Scotia prepared to acknowledge now without waiting for the findings of the Royal Commission, but based on common knowledge of circumstances as indicated by countless Micmac over time, that indeed Indians do not have the benefits, advantages and privileges as any others before the law as administered in Nova Scotia, for many reasons: language barriers, ignorance of the system, poverty, fear, mistrust developed over years of persecution et cetera?

Fifth, are the citizens of Nova Scotia prepared to accept the fact that regardless of their Country's highest Court's judgment that indeed the Micmac of Nova Scotia have special rights over and

above those enjoyed by other Nova Scotians, as acknowledged in valid treaties, and to date, that their elected Government in Nova Scotia continues to ignore that fact and Court decision by hindering the Micmac from exercising those rights?

Sixth, are the citizens of Nova Scotia prepared to accept the Constitution of Canada, which guarantees and protects the rights of the Aboriginal Peoples of Canada of whom the Micmac are one of those peoples, and thus that Canada indeed is made up of distinct societies of peoples?

Seventh, are the citizens of Nova Scotia, the Government of Nova Scotia, and the bureaucracy of Nova Scotia prepared to renew with the Micmac a treaty of peace and friendship acknowledging and respecting the dual societies of Nova Scotia - The Aboriginal and Non-Aboriginal?

Eighth, are the citizens of Nova Scotia, the Government of Nova Scotia, the bureaucracy of Nova Scotia and the Micmac of Nova Scotia willing to cooperatively work together to build a just, equitable, and law abiding Nova Scotia where one does not put the other at a disadvantage before its law by ignoring the Canadian Constitution, and the treatied rights of another society? Are the two societies willing to live within the cornerstone of democracy, the belief in God and the rule of law?

Ninth, are citizens of Nova Scotia and the Micmac themselves prepared to accept the fact that the Micmac people live in all parts of their land, and not just on Federally created reserves?

Tenth, can Nova Scotians and the Micmac ever hope to see an end to bigotry, racism, and intolerance in Nova Scotia, and teach their young about both societies and their past arrangements to live together in Nova Scotia?

Those are some of the fundamental issues which must be first understood, and then openly and cooperatively accepted by the two societies before any meaningful resolution could be achieved.

In my 15 years as an ardent advocate for my people, I can advise the Commission that to date for each of the ten issues identified there has been no acceptance of them by Nova Scotians as represented by their Government.

So, how do we begin to get some Yeses. For my part, and obviously I am biased, the Micmac through their many organizations, societies, and personal initiatives have proposed and proposed literally hundreds of initiatives which, if supported by the citizens of Nova Scotia through their elected Government, would by now have demonstrated that yes, the two societies in Nova Scotia are living in peace, and do have respect for each other.

Let me now turn to the issue of the report and the law. Let us assume that the time is right today or next year or in five years time to take issue number three and develop and implement a process whereby Indians shall have the same benefits, advantages and privileges before the Courts of Civil Judicature in Nova Scotia as any others of His Majesty's subjects/Nova Scotians.

Let us assume that the findings of the Commission simply state that indeed in this instance an Indian did not have the benefits, advantages and privileges before the Courts because of an early ideological belief by some members of one society that Indians always get into trouble and what's the difference which one it is, and the Indian's ideological belief based on other Indians' experience that no matter what I say or do, I am alone in this sea of another society's administration of its law.

Let us assume that one day both societies want that changed, and indeed want to demonstrate as two distinct societies of peoples living in a democracy that indeed *"the Micmac society of people do have the same benefits, advantages and privileges before the courts"* of civil judicature in Nova Scotia to resolve whatsoever their disputes be they civil, and even to take it another step further, criminal.

What would the majority of Nova Scotians, the Government of Nova Scotia, the bureaucracy of Nova Scotia and the Micmac be prepared to propose to achieve that 16 word phrase? Well for a start certainly not by ignoring that there are Micmac living off the reserve.

Certainly not by the Government of Nova Scotia refusing to co-sponsor at the least a Court Workers Program or similarly developed assistance to Indians before the Courts.

Certainly not by the Government of Nova Scotia itself ignoring Canada's highest Court decision that Micmac do have rights different from other Nova Scotians.

Certainly not by ignoring the modern reality that it is not enough to just politic about an issue, rather, once the issue has been thoroughly politicked, the next step is to govern under the principles of a democracy within a democratic country that under its Constitution recognizes the existence of distinct societies of people within it who must also be allowed to flourish and prosper by exercising their special rights and privileges unique to their distinct societies.

Certainly not by using a Royal Commission to simply become a safety valve to release the building pressure of a society for change in the administration of justice for Indian people in Nova Scotia. For my part, let us assume that I want to make the yes happen to that 16 word phrase, and offer several considerations in the development of a process to achieve that goal.

Would it be considered possible for the Micmac peoples to establish with the financial assistance of both the Provincial and Federal Government a "Micmac And The Law Foundation" composed of representatives of all Micmac, with the objective to ensure that all Micmac, regardless of residency, who come before the Courts shall have the same benefits, advantages and privileges as any others who come before the same Courts?

Would it be considered possible that the Provincial Legislature would create by an Act of the Legislature *The Micmac and the Law Foundation Act* codifying the process and procedures agreed by the two societies?

Would it be considered possible that the Foundation would propose to effect the recommendations contained in the preliminary report as well as others, and be accepted as a matter of law within the power of *The Micmac and the Law Foundation Act* by future legislatures?

Would it be considered possible that translation services, education about the legal system, legal aid, Native court workers, et cetera which would require hundreds of thousands of dollars to effect and maintain could be secured from existing Provincial and Federal revenues and funds designated to the administration of justice?

Would it be considered possible to have pronounced and included in every existing job description of persons involved with the administration of justice a Government Policy directive which ensures that at any time when an Indian comes before the Courts, everyone is satisfied that *"The Micmac does have the same benefits, advantages and privileges before the courts"* as any other?

Would it be considered possible that sometime in the future when more Micmac enter the legal system as lawyers, that based on current appointment criteria and in furtherance of the 16 word phrase, that a Micmac could one day be considered and appointed as a Judge?

These and much more could be considered possible, and I would gladly share and politic with everyone dedicated to bring about a Yes for issue three and reality to the 16 word phrase *"The Micmac society of people do have the same benefits, advantages and privileges before the courts"*, however, as a Micmac living in Nova Scotia, advocating for my people, all my life, and meeting constant resistance, and indeed on following the reportings of the Commission, I remain to be convinced that Nova Scotia is ready for change and to accept the Micmac as a distinct society of people within Nova Scotia, and accordingly begin to witness governing in that regard.

As learned and respected and indeed the single most important element of the foundation of a democratic society - The Judiciary, after hearing countless days of testimony in this inquiry alone from

countless witnesses, are you convinced that Nova Scotians through their Government of Nova Scotia are ready to just consider the possibilities that I have proposed, not even looking at the many others from other Micmac; let alone govern so as to make issue number three and the 16 word phrase a reality?

In summary, all problems of any society are resolvable; however, we must first be willing to explore the possibilities and then effect the necessary actions in stages or globally to resolve the problem. If we can't even begin to look at possibilities, or if we simply accept narrow views or recommendations which do not include all the Micmac people regardless of where they reside in Nova Scotia, we then simply prolong the problem.

I do not accept the comments made last Thursday that when the Commission has concluded their work and report, that we simply wait. Indeed, I feel that the Royal Commission, regardless of whether its findings support the Micmac contention that Micmac Indians have and continue to be disadvantaged before the Courts, or the Government's contention that this one prosecution could not be used as a basis to demonstrate that Indians are disadvantaged before the Courts. The Royal Commission is making history because since the time of the early treaties, and despite the countless complaints of the Micmac, the Royal Commission is the door opened for both societies to enter through co-operatively. And we must now step through the door and see what new arrangements are required to accommodate both societies living in one house, to at least assure ourselves *"The Micmac will have the same benefits, advantages and priviledges as any others before Her Majesty's Courts of Civil and Criminal judicature."*

Going Forward to A Better Future

Viola M. Robinson
President

cc:
Chief Justice T. Alexander Hickman
Associate Chief Justice Lawrence A. Poitras
The Honourable Mr. Justice Gregory Thomas Evans